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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

YALE BROADCASTING COMPANY, ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners Yale Broadcasting Company, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Yale Broadcasting Company v. FCC,* No. 71-1780, entered on January 5, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B hereto), and the *per curiam* opinion of the full Court denying rehearing *en banc* (Appendix A), have not yet been officially reported. The three related opinions of the Federal Communications Commission are reported at 31 F.C.C. 2d 385 (1971) (Appendix C), 31 F.C.C. 2d 377 (1971) (Appendix D), and 28 F.C.C. 2d 409 (1971) (Appendix E).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit (Appendix B) was entered on January 5, 1973. On April 6, 1973, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 4, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (1970).

QUESTIONS PRESENTED

1. Whether the Court of Appeals and the Federal Communications Commission correctly held that the First Amendment principle of *Smith* v. *California*, 361 U.S. 147 (1959), does not apply to the broadcast media, so that, unlike booksellers and distributors of "printed" speech, radio and television stations can be deprived of their licenses if they fail to ascertain, understand and "evaluate" the content of the recorded song lyrics they play.

2. Whether an administrative agency, after issuing policy statements that admittedly create confusion and chill protected speech, can refuse to exercise its "sound discretion," under Section 5(d) of the Administrative Procedure Act [5 U.S.C. § 554(e)], to issue a declara-

tory judgment to radio and television broadcasters who request guidance for complying with agency policy without jeopardizing their licenses.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (1970), provides:

> "The agency with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty."

Section 1.2 of the Federal Communications Commission's Rules, 47 C.F.R. § 1.2 (1972), provides:

> "The Commission may, in accordance with Section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty."

STATEMENT OF THE CASE

This case involves three orders of the Federal Communications Commission which require radio and television stations to ascertain the content and meaning

of all song lyrics they play, and make a "judgment" concerning the wisdom of broadcasting songs with specific messages. Although the Commission's opinions were aimed primarily at record lyrics with "language tending to promote or glorify the use of illegal drugs" (App. E, p. 39a), they were broad enough to regulate the broadcast of all "recorded musical or spoken selections" (App. E, p. 39a).

The Commission's first order was adopted by Public Notice released *sua sponte* on March 5, 1971.[1] (See *Licensee Responsibility to Review Records Before Broadcast*, App. E, p. 39a). The notice prohibited broadcast licensees from playing musical recordings without making "reasonable" efforts to (1) listen to each recorded song or otherwise "ascertain" the "meaning" of its "words or lyrics"; (2) judge whether individual songs tended to "promote or glorify" illegal drug usage; and (3) determine whether broadcast of such lyrics served the public interest. Failure to comply with such screening procedures would jeopardize the station's license and "raise serious questions as to whether continued operation of the station is in the public interest."

Three of the six participating Commissioners stated separately that the purpose of the Notice was to induce licensees to "censor" or "eliminate" the broadcast of

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[1] The Commission did not utilize the rule making provisions contained in Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1970). The Notice therefore was issued without formal notice. Interested parties had no opportunity to submit advance comments for the record.

allegedly drug-oriented songs.[2] Many licensees accepted their statements as controlling.[3] Stations removed many songs from the air.[4] Records were defaced

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[2] Commissioner Robert Lee, joined by Commissioner Houser, observed: "I sincerely hope that the action of the Commission today . . . will discourage, if not eliminate, the playing of records which tend to promote and/or glorify the use of illegal drugs" (App. E, p. 40a). Commissioner Nicholas Johnson disserted, calling the Notice an "unsuccessfully disguised effort" to "censor song lyrics." He added: "Under the guise of assuring that licensees know what lyrics are being aired on their stations, the FCC today gives a loud and clear message: get those 'drug lyrics' off the air . . . or you may have trouble at license renewal time" (App. E, p. 42a). Commissioner H. Rex Lee concurred, stating his regret that the Notice did not apply to all programming (App. E, p. 40a). Commissioner Houser also concurred, warning that the broadcast industry might be contributing "to the drug problem" (App. E, p. 41a).

[3] Several licensees in a Virginia survey described their reactions: "If there is a mention of drugs in a record, it is off because of this ruling—any drug lyrics and it goes . . . . [I]f it's not clear, or it's marginal, then we've got to protect ourselves and we won't play the song" (J.A. 164). ("J.A." references are to the Joint Appendix filed with the Court of Appeals below. A certified copy has been lodged with the Clerk of this Court.) "[T]he FCC is saying, 'Even though this isn't a regulation, you had better watch yourself, because we will ask you questions about it [songs with drug references] next time your license comes up for renewal'" (J.A. 166-67). "[W]hy hassle it—other songs are available and we will make the same money without playing drug songs . . . . License renewal comes up in 1972, and everybody is holding their breath" (J.A. 167). Many similar reactions appear at J.A. 158-78.

[4] Stations banned many well-known songs, including "Puff the Magic Dragon" (Peter, Paul & Mary), "Lucy in the Sky With Diamonds" (Beatles), "With a Little Help From My Friends" (Beatles), "Mr. Tambourine Man" (Bob Dylan), and "White Rabbit" (Jefferson Airplane) (J.A. 169-76). One licensee banned all Bob Dylan records because it "could not interpret the lyrics" (J.A. 148). Records thought to be drug-related were put on "Do Not Play" lists (J.A. 87-88, 147-48).

to prevent accidental broadcast (J.A. 195[4a]). "Do Not Play" lists of forbidden songs were circulated through stations (J.A. 87-88, 147-48). Announcers were fired for playing songs with suspected drug connotations, or for failing to pre-screen their selections (J.A. 88-89, 148).

Petitioners herein asked the Commission to reconsider and withdraw its Notice on constitutional and statutory grounds.[5] Petitioners, who represent various interests, are the college radio stations of Yale University and the University of the Pacific (California), a national drug abuse council, three announcers fired by management for playing records deemed banned by the Commission, several announcers who felt intimidated in their selection of records, and various listeners of stations that had removed specific records from the air.[6]

The Commission denied the petitions for reconsideration on April 16, 1971 (App. D, p. 33a). While it addressed the issues raised in "greater detail," its

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[4a] "J.A." refers to the Joint Appendix in the Court below which the parties have lodged with the Clerk of this Court.

[5] Petitioners argued, *inter alia*, that the Commission had impermissibly induced broadcast licensees to self-censor protected speech, had subjected the broadcast of protected songs to unconstitutional "prior restraints," had violated the no-censorship ban in Section 326 of the Communications Act, 47 U.S.C. § 326 (1970), and had acted without the notice and procedural safeguards for rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553 (1970). (See J.A. 22-67)

[6] Petitioners are Yale Broadcasting Company (WYBC-FM, New Haven, Conn.), University of the Pacific (KUOP-FM, Stockton, Calif.), National Co-ordinating Council on Drug Abuse, Inc., Steve Leon, John Gorman and Kenneth Currier (discharged announcers), Charles Laquidara, Stuart Jackson and James Irwin (announcers and station managers), and Mark Gorbulew and Sara Vass (Washington, D.C., residents and listeners).

opinion and order "adhere[d] fully" to the policy stated in its first Notice:

> " 'Whether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage is a question for the judgment of the licensee. The thrust of this Notice is simply that the licensee must make that judgment and cannot properly follow a policy of playing such records without someone in a responsible position (i.e., a management level executive at the station) knowing the content of the lyrics' " (App. D, p. 33a; see App. E, p. 39a).

The Commission also clarified its earlier Notice in two respects.

First, it conceded that songs referring to drugs are protected speech and immune from direct censorship by the Commission (App. D, p. 34a).[7] Stating that a licensee is "not a book store" (App. D, p. 36a), however, the Commission reminded stations that they must still know the "content" of the records they played. Stations, in other words, might play any song they wished. But they could lose their licenses if they did so without knowing the "meaning" of the lyrics, and without deciding whether those songs served the public interest.

Second, the Commission stated that a licensee's attempts to acquire knowledge of a record's content need not be "extensive"—merely "reasonable" (App. D, p. 36a). Licensees, the Commission suggested, could acquire the requisite knowledge by pre-screening each record before airplay, by instructing announcers to

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[7] Although Chairman Burch concurred in this conclusion, he later indicated to Senator Nelson that he would "vote to take the license away" from any station playing songs that promoted the use of drugs." (App. A, p. 5a).

bring records they had played "once" to a "responsible management official" for final screening, or by screening records named in listeners' complaints (App. D, pp. 35a-36a). Although individual records were not banned, a licensee failing to make "reasonable" attempts at learning their content would still lose its license.[8]

Despite this second opinion, uncertainty remained in the broadcast industry.[9] Petitioners accordingly requested the Commission to reconsider and clarify its opinion in certain respects, and withdraw it in others. In addition, petitioner Yale Broadcasting Company drafted compliance guidelines of its own in the form of a proposed "Station Policy Concerning the Broadcast of Musical Recordings" (see App. C, p. 30a). Yale asked the Commission to provide it with a declaratory order stating whether its proposed "Policy" would comply with the Commission's song lyric procedures,

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[8] Commissioner Wells concurred in the Commission's opinion, but stated somewhat contradictorily that evaluating the content of record lyrics was "an impossible assignment" (App. D, p. 38a). Commissioner Bartley concurred, but only to the extent that the Commission's opinion "return[ed] to the situation prior to release of the Public Notice of March 5, 1971" (App. D, p. 38a). Commissioner Johnson again dissented.

[9] Several licensees remarked: "What they are saying and what they mean are two different things—they meant to tell broadcasters what not to play" (J.A. 338). "They say that they now won't take away your license, but also say don't play pro-drug records—it makes no sense at all. I'm going by the first one [the Public Notice of March 5th]" (J.A. 339). "[T]he order says you can't be prosecuted for playing drug-oriented songs, but yet you must know what you are playing. This requires me to know the lyrics of every song I play, which is absurd, because you just can't hear or understand some of the lyrics of some songs .... I feel the whole thing could turn into a witch-hunt" (J.A. 343). Further similar comments appear at J.A. 336-46.

or whether, if implemented, it would jeopardize Yale's license.[10] Yale's "Policy" expressed awareness of the drug problem, but proposed to deal with it in public service and news programming. In this manner, Yale hoped to retain its freedom to select records for broadcast on the basis of their artistic merit, and not the meanings of specific lyrics. Yale contended that the uncertainty surrounding the Commission's prior rulings should impel the Commission to give it guidance by ruling on its proposed programming "Policy."

The Commission denied all of petitioners' requests in a third opinion on August 18, 1971 (App. C, p. 27a). It described its ascertainment policies as "amply clear" and refused to clarify or withdraw its earlier opinions. The Commission also refused to issue a declaratory order on the validity of Yale's proposed programming "Policy," finding it "abstract" and "not fleshed out by the licensee's actual operation." "In this delicate area," the Commission concluded, "we think it preferable to avoid unnecessary rulings" (App. C, p. 28a).

Commissioner Johnson again dissented. He called the Commission's policies "so vague and overbroad as to continue to be impermissible under the First Amendment," and urged the Commission to "issue a clear and unequivocal repudiation and withdrawal of our March 5 and April 16, 1971 Policy Statement" (App. C, pp. 28a, 30a). Only in this manner could the "chilling

[10] Yale Broadcasting Company invoked Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (1970), and Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2 (1972), to request the declaratory ruling. Section 1.2 of the Commission's Rules simply authorizes the Commission to issue declaratory rulings in a manner consistent with Section 5(d) of the APA.

effect" on freedom of broadcast speech be partially repaired.[11]

On a petition for review to the Court of Appeals for the District of Columbia Circuit, petitioners urged two basic grounds for reversal. First, they argued that this Court's opinion in *Smith* v. *California*, 361 U.S. 147 (1959), prevented the Commission from placing on broadcast licensees the procedural burden of examining every record they played for content, meaning, and merit. To do so would curtail the diversity and quality of musical expression available to the public. Second, petitioners argued that the Commission abused its "sound discretion" under Section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e) (1970), by refusing to grant Yale Broadcasting Company's request for a declaratory order. Without a declaratory ruling, Yale would be forced either to abandon its proposed "Policy" for broadcasting songs, to the detri-

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[11] Commissioner Johnson observed:

"[W]hen the President of the company (or . . . the Chairman of the FCC) shouts at us and tells us to stop what we're doing it takes an unusually strong (or foolish) person to go on speaking or performing as before—however deeply he feels about it. No matter how urgently we are subsequently assured that all is forgiven and that we are encouraged to 'speak our minds' (or . . . that the FCC doesn't really mean to ban records) we have already been psychologically inhibited. The First Amendment damage has already been done.

* * * *

". . . Broadcasters—courageous and cowardly alike—are a pretty skittish lot . . . . Having been told—very loudly and clearly—that powerful people in Washington are interested in their records' song lyrics, all too many will go out of their way to select lyrics designed to please. At that point the government has succeeded in its purpose; it is then safe to issue all the apologies and rescinding statements necessary to silence the critics" (App. C, pp. 29a, 30a).

ments of its First Amendment rights, or proceed at its peril and possibly risk its license at renewal time.[12]

The Court rejected both arguments in an opinion noticeably hostile to contemporary popular songs.[13] The Court dismissed *Smith* v. *California, supra,* by stating that broadcasters needed to screen fewer records than booksellers books, and that broadcasters could not make judgments about the "wisdom" or "value" of the music they aired without understanding the words and meanings of individual songs (App. B, p. 17a). The Court affirmed the Commission's refusal to issue a declaratory order, viewing its decision as an exercise of "sound discretion." The Court did not require the Commission to make any specific showing that First Amendment speech values were unimpaired by its inaction. It stated that Commission refusals

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[12] The petitioners also urged the Court to reverse the Commission on a third ground, namely that the Commission's policy on song lyrics was such a substantial departure from past rulings, that it could only be promulgated through the rule-making procedures of Section 4 of the APA, 5 U.S.C. § 553 (1970). The Court explicitly rejected the argument. While the petitioners do not present the argument as an independent ground for granting certiorari, they reserve the right to advance it as a ground for reversal should certiorari be granted.

[13] Lyrics were described as "completely meaningless gibberish" that "approach the equivalent of machinery operating or the din or traffic" (App. B, p. 18a). "At some point along the scale of human intelligibility the sounds produced may slide over from characteristics of free speech, which should be protected, to those of noise pollution, which the Commission has ample authority to abate" (citing the Noise Control Act of 1972) (App. B, p. 18a). The Court analogized "canned" recorded music to "pork and beans" in a can on a grocery shelf (App. B, p. 19a), and described songs as "the banal observations of a moon-struck adolescent" or "two enraged alley cats fighting in a garbage can" (App. B, pp. 22a-23a).

to issue declaratory orders would be reversed only for a "clear abuse of discretion," and implied that agency discretion in this area was substantial, if not complete.

The full Court of Appeals denied a motion for rehearing *en banc* initiated by Chief Judge Bazelon (App. A, p. 1a). Chief Judge Bazelon dissented in a separate statement, arguing that the case presented unresolved "questions of considerable significance" (App. A, pp. 7a-8a).

REASONS FOR GRANTING THE WRIT

I. THE COURT BELOW HAS DECIDED A MAJOR QUESTION CONCERNING THE FIRST AMENDMENT RIGHTS OF BROADCASTERS THAT CONFLICTS WITH A PRIOR DECISION OF THIS COURT

The decision below undercuts this Court's opinion in *Smith v. California, supra,* and renders it inapplicable to the most important media of communication today. The Court of Appeals has ruled that the Government may impose procedural burdens on the First Amendment activities of broadcasters that could not be imposed on booksellers. This Court in the past has scrutinized prior restraints on speech with strict care. It has sustained slight procedural burdens in the area of broadcast speech, but only where they are clearly designed to *increase* the overall diversity of views available to the public.[14] In a major departure, the decision below imposes substantial burdens on protected broadcast speech which will only result

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[14] *Red Lion Broadcasting Co., Inc.* v. *FCC*, 395 U.S. 367, 389-92 (1969) (potential "chilling effect" of fairness doctrine procedures outweighed by countervailing increase in diversity of views); *see generally*, Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 920 (1970).

in restricting rather than diversifying the public's access to protected speech.[15]

In *Smith v. California, supra,* this Court struck down a California law making it a crime for a bookseller to possess an obscene book without knowledge of its contents. The Court reasoned that such a law would force booksellers to play it safe and sell only those books they had read. By reducing the number and variety of books sold, the "public's access to [protected] reading matter would be restricted." *Smith* v. *California, supra,* at 154.[16]

If California, instead, had made it a crime merely to sell any *unread* book—whether obscene or not—a similar restraint would have been placed on printed speech. Book stores could only sell the books they had read. Yet the Court of Appeals below has imposed precisely this requirement on broadcast licensees. Stations can now only play records they have "read."

Indeed, the Court of Appeals' decision is significantly more restrictive than the California statute in *Smith.* There, booksellers could at least risk selling

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[15] Unlike the "obscene" books in *Smith* v. *California, supra,* the broadcast speech here in question is not "illegal." The Commission therefore has no legitimate interest in *suppressing* songs with drug implications, and its policies cannot be sustained on that rationale alone. *See generally, Bradenburg* v. *Ohio,* 395 U.S. 444, 449 (1969) ("mere advocacy" of illegal conduct is protected speech); *Kingsley Int. Pictures Corp.* v. *Regents,* 360 U.S. 684, 688-689 (1959) (invalidating "desirable, acceptable, or proper" as a statutory standard for suppressing speech).

[16] "For if the bookseller is criminally liable without knowledge of the contents [of his books], . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . ." *Smith* v. *California, supra,* at 153.

books from obviously "safe" categories—cooking, travel, children, adventure—without having to read them. They could quickly familiarize themselves with the content from the cover, illustrations, publisher, or book reviews. Booksellers would be forced actually to read only books from "potentially risky" categories. Under the Court of Appeals' decision, however, there are no "safe" categories. Licensees must make efforts to ascertain the meaning and content of *all* records they play.[17] And they can only do that by *listening* to each record.[18] Unlike a book, a record cannot be skimmed; each forty-five minute album takes forty-five minutes to "read." The public's right to hear will be measured by the licensee's ability to digest the record lyrics in his library.[19]

The Court's decision below is more restrictive than *Smith* in one additional respect. There, booksellers could only be punished for distributing *unprotected* ("obscene") speech. Here, however, broadcast licensees can be punished for broadcasting *protected*

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[17] It should be noted that the Court of Appeals viewed the Commission's policies as mandatory, not discretionary: "[W]e conclude that for the Commission to have been less insistent on licensees discharging their obligations would have verged on an evasion of the Commission's own responsibilities" (App. B, p. 19a).

[18] Record lyric texts are rarely available and occasionally erroneous or unreliable (J.A. 108).

[19] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964), also struck down analogous restrictions on printed speech. This Court held that the procedural burden of checking all controversial statements for "truth" would deter newspapers from covering many controversial stories. The difficulty of screening records for meaning and content is equally burdensome. *See Washington Post Co.* v. *Keogh*, 365 F.2d 965, 972 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967).

speech—song lyrics—that they failed to "read" or screen.

The Court of Appeals seeks to avoid the logic of *Smith, supra,* by postulating differences between broadcast stations and book stores. It suggests, for example, that a screening burden is less for broadcast stations because they only need to screen the song lyrics actually broadcast (App. B, pp. 16a-17a). This suggestion is factually contradicted by the record below (J.A. 43), however, and overlooks the fact that the records eventually broadcast must be culled from literally thousands of other available albums.[20]

The Court of Appeals also states that broadcasters, unlike book stores, must make judgments concerning the "wisdom" or "value" of their programming, and can do this only by knowing the "content" of that programming (App. B, p. 17a). This statement mistakenly assumes, however, that the "wisdom" or "value" of contemporary songs can be judged by their words alone. Quite the contrary, the words and music of popular songs, like poetry, are an esthetic whole, unifying thought and expression.[21] Broadcast licensees must be able to select and broadcast music on the basis of its overall artistic qual-

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[20] Some stations have over 7,000 record albums in their libraries, each playing 30 to 40 minutes (J.A. 43). Petitioner Yale Broadcasting Company, with 5,000 albums, would need 2,500 hours just to screen them once (J.A. 70). Moreover, many stations receive over 200 new albums each week (J.A. 70). Although petitioners submitted these figures to the Court of Appeals below, the Court did not discuss them.

[21] "A song, after all, is not a speech. Like any work of art, it bounces back different meanings to different people at different times, as life shines new light on it." P. Seeger, *When the Mode of the Music Changes,* 1 (1971).

ity. The Court of Appeals has improperly forced licensees to single out and inspect song lyrics alone. Without discussion, the opinion below has relegated the nonverbal portion of contemporary music to an inferior and less protected status. Whether a "popular song is a constitutionally protected form of speech" (Bazelon, C.J., App. A, p. 8a), however, is a question of substantial importance, and should be resolved in the first instance by this Court.

The opinion below also misconstrues the seriousness of the burden entailed in ascertaining the meaning and content of contemporary song lyrics. In many instances the lyrics are difficult to hear (J.A. 107-12). Music may drown out entire words and phrases. The lyrics are often chimerical, ambiguous and difficult to understand. Experienced announcers may require hours to decipher the words of one song (J.A. 107-14). Mistakes of interpretation or unjustified doubts may induce licensees to remove ambiguous but musically important songs.[22] In short, as Chief Justice (then Judge) Burger has observed, a requirement that licensees ascertain the content of programming "'is simply a euphemism for censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments.'" *Anti-Defamation League of B'nai B'rith* v. *FCC*, 403 F.2d 169, 172 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

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[22] Licensees, for example, have banned the Beatles' satire on American violence, "Happiness is a Warm Gun," fearing it might advocate the "injection of heroin" (J.A. 110-11). Many experienced announcers have attested that they cannot tell conclusively what many song lyrics signify, or whether a particular message "promotes or glorifies" illegal drugs (J.A. 76-78, 86-87, 109-110, 114, 180-93).

II. THE DECISION BELOW IS IN CONFLICT WITH AN IMPORTANT DECISION OF THE SECOND CIRCUIT

The opinion below upheld the Commission's refusal to issue a declaratory order on the acceptability of Yale Broadcasting Company's proposed "Policy" for compliance with the Commission's song lyrics statements. In so doing, it failed to acknowledge a conflicting decision from the Second Circuit, ignored the legislative history to Section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e) (1970), and forced Yale into an untenable dilemma—either abandon its proposed programming "Policy," or risk the loss of its license at renewal. This Court should resolve the conflict among the Circuits concerning the extent to which administrative agencies can refuse to issue declaratory orders eliminating uncertainty in the First Amendment area.

Section 5(d) of the Administrative Procedure Act provides that an administrative agency, "in its *sound discretion,* may issue a declaratory order to terminate a controversy or remove uncertainty" (emphasis supplied). Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2 (1972), authorizes the Commission to issue "declaratory rulings" pursuant to Section 5(d).

Relying on Sections 5(d) and 1.2, Yale Broadcasting Company asked the Commission to issue a declaratory order stating whether its proposed "Policy" for broadcasting records complied with the Commission's prior statements. Yale's "Policy" (see App. C, p. 30a) assumes *a priori* that some records aired on the station will inevitably contain words or lyrics with possible drug connotations.[23] Instead of instructing its an-

[23] It is difficult to imagine a popular song without some words that could not be stretched into drug references. In 1932, people

nouncers to review and possibly remove such records from the air, Yale proposed to broadcast separate anti-drug messages in the nature of public service and news announcements. Yale hoped to ameliorate the problems of drug abuse without reviewing the lyrics of individual songs.

The Commission refused to issue a declaratory ruling, finding it "preferable to avoid unnecessary rulings" in a "delicate" area "not fleshed out by the licensee's actual operation" (App. C, p. 28a). The Court of Appeals affirmed, stating that "critical facts" were missing from Yale's request, that "subsequent events" might alter them, and that no "clear abuse of discretion" was found in the denial of Yale's request.[24]

The Court's opinion below is in direct conflict with a recent decision of the Second Circuit. In *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970). several broadcasters asked the Commission, pursuant to Section 5(d), to issue a declaratory ruling stating whether a list of proposed programs would violate the broadcast ban on information concerning "lotteries."[25] The Commission refused to rule on some of the proposals, stating it was "clearly not

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sang: "Every kiss, every hug seems to act just like a drug. You're getting to be a habit with me . . . . I'm addicted to your charms." In 1934 Cole Porter wrote: "Some they may go for cocaine. I'm sure that if I took even one sniff, it would bore me terrifically, too. I get a kick out of you." Many contemporary songs extoll "legal" drugs such as alcohol and nicotine (see App. C, p. 43a).

[24] Because Yale's "Policy" only proposed to adopt operating *procedures*, there were no "critical facts" or "subsequent events" that might have affected its implementation.

[25] See 18 U.S.C. § 1304 (1970) (Communications Act).

practical to attempt to rule on all of the various materials submitted by the parties in the absence of a particular factual situation."

The Second Circuit reversed. It ordered the Commission to rule on all of petitioners' proposals:

> "Petitioners complain about the order's lack of specificity as well as the Commission's failure to rule on a number of the requests made to it.... We think these concerns are to some extent justified. There have apparently never been any prosecutions for violations of Section 1304 ['lotteries'], and we find no other judicial opinions explicitly interpreting the 'information concerning' language of the statute. In view of this, and *because of the great interest broadcasters have in not jeopardizing their licenses,* we believe that the proper course is to set aside the Commission's declaratory ruling to allow it to reconsider petitioner's request in light of this opinion." *Id.* at 997-98 (emphasis supplied).

The controlling facts in the Second Circuit's opinion are virtually identical to those in the Court's opinion below. In each case the Commission's rulings lacked specificity and had generated substantial confusion.[26] Here, as in *New York State Broadcasters,* the Commission had issued no complaints, license revocations or other adjudicatory rulings containing guidelines for compliance with its orders. Like the petitioners in *New York State Broadcasters,* Yale Broadcasting Com-

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[26] The Commission itself commented that its first Notice was "widely" and "erroneously depicted" in the press (App. D, pp. 33a-34a). The Commissioners themselves could not agree on the meaning of their actions and issued numerous concurring and dissenting opinions. The detailed evidentiary materials submitted by petitioners document this confusion (J.A. 69-204, 333-46).

pany expressly asked the Commission for a declaratory order to avoid "jeopardizing" its license at renewal. In both cases the Commission's refusal to rule left a residual chill on protected speech.

The District of Columbia and Second Circuits have split over the proper standard for reviewing an agency's refusal to clarify its policies in the First Amendment area.[27] The Second Circuit will not defer to Commission discretion where the Commission itself has caused uncertainty, lacks guiding precedents, and suggests that improper conduct might cost the broadcaster its license. Under identical circumstances, the District of Columbia Circuit will defer to any agency action short of a "clear abuse of discretion" (App. B, p. 25). The Second Circuit, in short, has construed "sound discretion" under Section 5(d) to hold the Commission to a higher standard of judicial review, and a greater burden of proof, where its licensees' First Amendment rights are involved.

It also seems apparent that the Court's opinion below conflicts with Congressional intent in enacting Section 5(d). Legislative history demonstrates that Congress intended to give persons a right to obtain declaratory

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[27] This conflict is aggravated by the fact that three older Circuit Court rulings suggest that an agency's refusal to issue a declaratory ruling is completely discretionary and unreviewable altogether. See *W. J. Dillner Transfer Co.* v. *McAndrew*, 226 F. Supp. 860 (W.D. Pa. 1963), *aff'd*, 328 F.2d 601 (3rd Cir. 1964) (*per curiam*); *Continental Oil Co.* v. *FPC*, 285 F.2d 527 (5th Cir. 1961); *United Gas Pipeline Co.* v. *FPC*, 203 F.2d 78 (5th Cir. 1953). These cases, however, did not involve First Amendment issues, and seem clearly incorrect in light of clear legislative history. See, *e.g.*, Senate Judiciary Committee, *Committee Print*, Sen. Doc. No. 248, 79th Cong., 2d Sess. p. 25 (1946), and discussion *infra*.

relief from administrative agencies to determine the consequences of their proposed action, "without the necessity of any party's acting at his peril upon his own view . . . ."[28] While Congress evidently envisioned some agency discretion, it required that this discretion be "sound" and reviewable in the federal courts.[29] The issuance of administrative declaratory orders were to be governed by the same principles that governed the issuance of declaratory judgments in the courts.[30] The scope of permissible discretion was to turn on the facts of each individual case. By withholding a ruling on Yale's proposed "Policy" in the instant case, the Court below has deprived petitioners of the guidance anticipated by the drafters of Section 5(d) of the Administrative Procedure Act.

The Court's opinion also conflicts with First Amendment principles underlying decisions of this Court. Just as ordinary burdens of proof are shifted in First Amendment areas, see *Speiser* v. *Randall*, 357 U.S. 513 (1958), and administrative procedures are adjusted to accommodate important speech interests, see *Freedman* v. *Maryland*, 380 U.S. 51 (1965), so, here, the ordinary scope of agency discretion must reflect the First Amendment rights of licensees regulated by an administrative agency. Where economic interests are involved, of course, a reviewing Court may be justified in affirming agency action that falls short of a "clear

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[28] *Administrative Procedures in Government Agencies, Report of the Committee on Administrative Procedure*, Sen. Doc. No. 8, 77th Cong., 1st Sess., p. 30 (1941).

[29] "[T]he phrase 'sound discretion' means a reviewable discretion and will prevent agencies from either giving improvident declaratory orders *or arbitrarily withholding such orders in proper cases.*" (Senate Judiciary Committee, *Committee Print*, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 25 (1946) (emphasis supplied).

[30] See *Committee Print, supra*, at 204, 263, 362.

abuse of discretion." But where First Amendment interests are at stake, the standard of review must be substantially narrower.[31] Non-judicial administrative agencies must be given far less discretion to impinge on protected First Amendment activities than the Court has tolerated below.[32]

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 4, 1973

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[31] Cf. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152 *note* 4 (1938).

[32] Some commentators have further argued that the First Amendment requires the courts to provide applicants with declaratory judgments whenever they are uncertain whether their proposed speech activities involve protected or unprotected speech. See H. Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518 (1970). Whatever the force of this argument, Congress has already provided for such declaratory relief before administrative agencies under Section 5(d) of the Administrative Procedure Act.

APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1780

YALE BROADCASTING COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, AND UNITED STATES OF AMERICA, RESPONDENTS

On Motion for Rehearing En Banc

Filed March 28, 1973

Before BAZELON, *Chief Judge*, and WRIGHT, McGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

PER CURIAM: The motion for rehearing *en banc* initiated by a member of the Court in regular active service is denied, a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure).

Separate Statement by Chief Judge Bazelon as to why he would grant rehearing *en banc, sua sponte*.

BAZELON, *Chief Judge*: This litigation concerns a series

of directives issued by the Federal Communications Commission in 1971 which advised the nation's broadcasters that they were expected to exercise "responsibility" in regard to the playing of "drug-oriented" popular records.[1] The petitioners argued that the impact of the Commission's rulings was indirect censorship of these songs. The panel of this court which heard the case decided that the Commission's statements merely reiterated a traditional Commission policy—that broadcast licensees must "assume responsibility for all material which is broadcast through their facilities".[2] After reviewing the panel decision, I moved for rehearing of the case *en banc*.[3]

The panel opinion found that the language of the Commission's directives does not purport to censor popular songs. But that language can only be understood in the light of the Commission's course of conduct.

The Commission's initial statement in the area of "drug-oriented" songs was a "Public Notice" issued on March 5, 1971.[4] The Notice, entitled "Licensee Responsibility to Review Records Before Their Broadcast", did not specifically prohibit the playing of particular songs. But broadcasters might well have read it as a prohibition. For

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[1] As to the nature of the broadcasters' "responsibility", *see* p. 4, infra.

[2] Yale Broadcasting Co. v. FCC, slip op. at 11, quoting Report and Statement of Policy re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291, 7295, 30 R.R. 1902, 1912-13 (1960).

[3] Rule 35(a), Federal Rules of Appellate Procedure. This is—and should be—an unusual procedure. *See, e.g.*, U.S. v. Sambro, 147 U.S. App. D.C. 75, 454 F.2d 918 (1971) (Statement of Chief Judge Bazelon); Southern Ry. Co. v. Lanham, 408 F.2d 348 (5th Cir. 1969) (dissent from denial of rehearing en banc).

[4] 28 FCC 2d 409 (1971).

one thing, two members of the Commission, including the member reported to be the originator of the Notice,[5] appended to it a formal statement explaining that their goal was to "discourage, if not eliminate, the playing of records which tend to promote and/or glorify the use of illegal drugs."[6] Five weeks after the Notice was issued, the Commission's Bureau of Complaints and Compliance provided broadcasters the names of 22 songs which had come to its attention as "so-called drug-oriented song lyrics."[7]

The Commission's action was reported by responsible organs of the press an an act of censorship.[8] It appears that radio stations moved quickly to ban certain songs. In some cases stations stopped playing, regardless of subject or lyric, all the works of particular artists whose views might lift the Commission's eyebrow.[9] Broadcasters circulated the list of 22 songs throughout the industry as a "do not play" list.[10]

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[5] *I.e.*, Cmr. Robert E. Lee; *cf. Week's Profile*, BROADCASTING, May 3, 1971, p. 67.

[6] 28 FCC 2d 410, 411 (1971).

[7] In its subsequent Order, *infra* p. 4, the Commission reported that the 22 songs had been identified by the Department of the Army. Apparently the Commission conferred with military officials before issuing the initial Public Notice. 31 FCC 2d 79 (1971). The Commission did not consult with the Bureau of Narcotics and Dangerous Drugs. N.Y. Times, March 28, 1971, p. 41, c 1.

[8] *See, e.g.*, headlines quoted at 32 FCC 2d 377 (1971) and N.Y. Times, March 7, 1971, p. 28, c. 3.

[9] Joint App. at 87-88; *see* Brandywine-Mainline Radio, Inc. v. FCC, No. 71-1181 (D.C. Cir. Nov. 4, 1971) (Chief Judge Bazelon dissenting) slip op. at 31 n. 60.

[10] Joint App. at 148.

The Commission's subsequent "Memorandum Opinion and Order", issued on April 16, 1971,[11] and designated by the Commission as its "definitive statement" on the subject, appeared to backtrack somewhat. The Order repudiated the list of 22 songs. It stated that the evaluation of which records to play "is one solely for the licensee", and that "[t]he Commission cannot make or review such individual licensee judgment."

But the Commission's order went further. Instead of rescinding the Public Notice, the Order restated its basic threat: "the broadcaster could jeopardize his license by failing to exercise licensee responsibility in this area." As we have recognized, "licensee responsibility" is a nebulous concept.[12] It could be taken to mean—as the panel opinion takes it—only that "a broadcaster must 'know' what it is broadcasting." On the other hand, in light of the earlier Notice, and in light of the renewed warnings in the Order about the dangers of "drug-oriented" popular songs, broadcasters might have concluded that "responsibility" meant "prohibition".

The Commissioners themselves were unclear on the matter. The Order expressed full adherence to the policy of the prior Notice. But two Commissioners issued concurring statements indicating that the Order restored the status quo prior to the March 5 Notice.[13] A third Commissioner issued a dissenting statement indicating that the Order did not restore the status quo.[14] A fourth Commissioner issued a rather enigmatic statement indicating his agreement

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[11] 32 FCC 2d 377 (1971).

[12] Anti-Defamation League of B'nai B'rith v. FCC, 131 U.S. App. D.C. 403 F.2d 169 (1968).

[13] 32 FCC 2d 382 (1971) (Cmrs. Bartley and H. Rex Lee).

[14] *Id.* at 386. (Cmr. Johnson).

with both the Notice and the Order but observing that they established an "impossible assignment."[15] The confusion was crystallized later in 1971 in Congressional testimony by FCC Chairman Burch. At one point, the Chairman offered this assurance:

> Chairman Burch: . . . [C]ontrary to Commissioner Johnson's statement that we banned drug lyrics, we did not ban drug lyrics. . . .

Moments later, however, the following ensued:

> Senator Nelson: All I am asking is: If somebody calls to the FCC's attention that a particular station is playing songs that, in fact, do promote the use of drugs in the unanimous judgment of the Commission, if if you came to that conclusion, what would you do?
>
> Chairman Burch: I know what I would do, I probably would vote to take the license away.[16]

This court is the primary forum for judicial review of broadcast licensing regulation. In reviewing the Commission's actions in technical areas—*e.g.* policing broadcasters' mechanical operations and interference between stations—we must accord great deference to its decisions. But no such deference is due in cases involving the Commission's "public interest" regulation of program content. It is the "power to specify material which the public interest requires or forbids to be broadcast that carries the seeds of the general authority to censor. . ."[17] Courts have a

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[15] *Id.* at 382 (Cmr. Wells).

[16] *Hearings on the Effect of the Promotion and Advertising of Over-the-counter Drugs on Competition, Small Business, and Health and Welfare of the Public,* Before the Subcomm. on Monopoly of the Senate Select Comm. on Small Business, 92d Cong., 1st Sess., pt. 2 at 734-736 (1971).

[17] Banzhaf v. FCC, 132 U.S.App.D.C. 14, 26, 405 F.2d 1082, 1094 (1968), *cert. denied sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969).

> But we emphasize that our cautious approval [in *Banz-*

special responsibility to protect First Amendment rights and a special expertise for doing so.[18]

In *N.A.A.C.P. v. Button*, Mr. Justice Brennan observed that "precision of regulation must be a touchstone" in the area of freedom of expression.[19] There is no precision here. The Commission's chameleon-like directives reflect the spectrum from confusion to deliberate obfuscation. The court must look to the impact of these directives, not merely their language.[20] Such review is all the more necessary where the Commission's directives are couched in code words for license renewal such as "public interest" or "licensee responsibility". Seven years ago, a member of the Commission explained:

> Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion

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haf] does not license the Commission to scan the airwaves for offensive material with no more discriminating a lens than the "public interest" or even the "public health".

132 U.S. App. D.C. at 31, 405 F.2d at 1099.

[18] Freedman v. Maryland, 380 U.S. 51, 58 (1965).

[19] 371 U.S. 415, 438 (1963).

[20] *See, e.g.*, Baird v. State Bar of Arizona, 401 U.S. 1 (1971); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Bagget v. Bullitt, 377 U.S. 360 (1964); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 68 (1963); NAACP v. Button, 371 U.S. 415 (1963); Smith v. California, 361 U.S. 264 (1959); *Cf.* Laird v. Tatum, 408 U.S. 1, 12-13 (1972); Banzhaf v. FCC, 132 U.S. App.D.C. 14, 32-33, 405 F.2d 1082, 1100-01 (1968) *cert. denied sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969).

> and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air.[21]

Judge (now Chief Justice) Burger found this reasoning to be "unanswerable." *Anti-Defamation League of B'nai B'rith v. FCC*, 131 U.S. App. D.C. 146, 148, 403 F.2d 169, 171 (1968). In the differing circumstances of this case, that reasoning might be answerable. But the court cannot abdicate its responsibility to face the question.

The panel opinion indicates that the present challenges to the Commission's directives are premature; that the Commission's final sanction is denial of a license, and until that sanction is imposed, the petitioners cannot demonstrate any harm from the Commission's actions. Opposed to this viewpoint is the often recognized principle that the threat of legal sanction can have as much effect on the conduct of threatened parties as the sanction itself.[22] If that principle applies here, as petitioners argue, then there is a judicially cognizable injury as soon as broadcasters begin to alter their programming to avoid governmental reprisal.

This case presents several other questions of consider-

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[21] Complaint of Anti-Defamation League of B'nai B'rith Against Station KYTM, 6 FCC 2d 385, 398. (Cmr. Loevinger, concurring).

[22] CBS v. FCC, 316 U.S. 398, 414 (1941); *see* Environmental Defense Fund v. Hardin, 138 U.S.App.D.C. 391, 428 F.2d 1093, 1098-1100 (1970); *cf.* the candid statement of Clay T. Whitehead, Director of Telecommunications Policy in the White House, as to why the threat of license removal is an effective means of program control: "The main value of the sword of Damocles is that it hangs, not that it drops. Once you take a guy's license away, you no longer have any leverage against him." The Washington Post, March 9, 1973, at p. A 17 col. 3.

able significance: Is the popular song a constitutionally protected form of speech?[23] Do the particular songs at which these directives were aimed have a demonstrable connection with illegal activities?[24] If so, is the proper remedy to "discourage or eliminate" the playing of such songs? Can the FCC assert regulatory authority over material that could not constitutionally be regulated in the printed media?[25]

Clearly, the impact of the Commission's order is ripe for

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[23] Popular songs might be considered mere entertainment, or even noise pollution. Yale Broadcasting Co. v. FCC, slip op. at 9. On the other hand, historians and sociologists have noted that the popular song has been an important medium of political, moral, and aesthetic expression in American life. *Morison, Oxford History of the American People*, xxiii-xxvii, 223, 238, 250, 399, 479, 634, 860, 917 (1965); *Reich, The Greening of America*, 242-251. (1971).

[24] The only evidence in the record on this point is the statement of the Director of The Bureau of Narcotics and Dangerous Drugs expressing strong doubt that there is any connection between "drug-oriented song lyrics" and the use of drugs. The New York Times, March 28, 1971, p. 41, c. 1. *See* Banzhaf v. FCC, 132 U.S. App. D.C. 14, 31-32, 405 F.2d 1082, 1098-99 (1968), *cert. den. sub nom.* Tobacco Institute v. FCC, 396 U.S. 842 (1969). *Cf.* California v. Larue, 41 USLW 4039, (1973) (Marshall, J., dissenting).

[25] *See* Brandywine-Main Line Radio, Inc. v. FCC, No. 71-1181, (D.C., Cir. Nov. 4, 1972) (Chief Judge Bazelon, dissenting) (application of the Fairness doctrine). Unlike the "Fairness Doctrine" cases, there can be no assertion here that the chilling effect is incidental to providing access to the media for viewpoints that would contribute to a fuller debate on public issues. The question is thus presented whether the rationale of the "Fairness Doctrine", or any other realities of the electronic media, warrant intrusion on broadcasters' free speech rights in this case.

judicial review. And, on that review, it would be well to heed Lord Devlin's recent warning:[26]

> If freedom of the press . . . perishes, it will not be by sudden death. . . . It will be a long time dying from a debilitating disease caused by a series of erosive measures, each of which, if examined singly, would have a good deal to be said for it.

[26] Quoted in remarks by Richard S. Salant, to the Boston Univ. School of Public Broadcasting, Boston, Mass. April 28, 1971.

APPENDIX B

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1780

YALE BROADCASTING COMPANY, ET AL, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENT

Appeal from the Federal Communications Commission

Argued 24 October 1972

Decided 5 January 1973

Mr. Tracy A. Westen, with whom *Mr. Eric H. Smith,* was on the brief for petitioners.

Mr. Joseph A. Marino, Associate General Counsel, Federal Communications Commission, with whom *Messers. John W. Pettit* General Counsel, *R. Michael Senkowski,* Counsel, Federal Communications Commission, and *Howard E. Shapiro,* Attorney, Department of Justice, were on the brief, for respondents. *Mr. John H. Conlin,* Associate General Counsel, Federal Communications Commission at the time the record was filed, also entered an appearance for respondent, Federal Communications Commission.

Before DANAHER, *Senior Circuit Judge,* ROBINSON and WILKEY, *Circuit Judges.*

WILKEY, *Circuit Judge*: The source of this controversy is a Notice issued by the Federal Communications Commission regarding "drug oriented" music allegedly played by some radio stations.[1] This Notice and a subsequent Order, the stated purposes of which were to remind broadcasters of a pre-existing duty, required licensees to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use. Appellant, a radio station licensee, argues first that the Notice and the Order are an unconstitutional infringement of its First Amendment right to free speech. In the alternative, appellant contends that they impose new duties on licensees and must, therefore, be the subject of rulemaking procedures. Finally, it is argued that the statements' requirements are impermissibly vague and that the FCC has abused its discretion in refusing to clarify its position. Finding none of these arguments of the licensee valid, we affirm the action of the FCC.

I. *Substance of the First and Second Notices*

In the late 1960's and early 1970's the FCC began receiving complaints from the public regarding alleged "drug oriented" songs played by certain radio broadcasters. In response to these complaints the Commission issued a Notice, the stated purpose of which was to remind broadcasters of their duty to broadcast in the public interest.[2]

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[1] There are actually two major Federal Communications Commission actions involved in this dispute. The first is a *Public Notice*, 28 F.C.C.2d 409 (1971). The second is a *Memorandum Opinion and Order*, 31 F.C.C.2d 377 (1971). The sole purpose of the second item mentioned above was to clarify and modify the *Public Notice*.

[2] *Public Notice*, 28 F.C.C.2d 409 (1971).

To fulfill this obligation licensees were told that they must make "reasonable efforts" to determine before broadcast the meaning of music containing drug oriented lyrics. The Notice specified that this knowledge must be in the possession of a management level executive of the station, who must then make a judgment regarding the wisdom of playing music containing references to drugs or the drug culture.

This initial Notice led to substantial confusion within the broadcast industry and among the public. Confusion centered around the meaning of phrases such as "knowing the content of the lyrics," "ascertain before broadcast," and "reasonable efforts."

In order to clarify these ambiguities, the FCC issued a second Memorandum and Order clarifying and modifying certain parts of the original Notice.[3] The thrust of this Order was that (1) the Commission was not prohibiting the playing of "drug oriented" records, (2) no reprisals would be taken against stations that played "drug oriented" music, but (3) it was still necessary for a station to "know" the content of records played and make a "judgment" regarding the wisdom of playing such records.

II. *Interpretation of the Definitive Order*

Many of appellant's fears and arguments stem from the apparent inconsistencies between the Notice and the subsequent Order. It is quite clear, however, that the Order "constitutes the Commission's definitive statement" regarding broadcaster responsibility.[4] To the extent that the two

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[3] *Memorandum Opinion and Order*, 31 F.C.C.2d 377 (1971).

[4] In its Memorandum and Order, the FCC noted that its initial Notice had been widely misconstrued. The Commission then said:

[I]t follows that where a notice is so erroneously de-

are inconsistent or confused, we treat the Notice, as we believe the Commission intends, as superseded by the Order. Reference to the Commission's requirements is to those established by the Order.

Once the Order is taken as definitive, it becomes fairly simple to understand what the FCC asks of its licensees. The Order recognizes the gravity of the drug abuse problem in our society. From this basis, the Order proceeds to remind broadcasters that they may not remain indifferent to this severe problem and must consider the impact that drug oriented music may have on the audience.[5] The Commission then makes the common sense observation that in order to make this considered judgment a broadcaster must "know" what it is broadcasting.[6]

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picted, we should appropriately call attention to the error. We do so in this Memorandum and Order. While it adheres fully to the above noted established policy of licensee responsibility, this opinion treats the matter in greater detail and this constitutes the Commission's definitive statement in this respect.

31 F.C.C.2d at 378.

[5] "Clearly, in a time when there is an epidemic of illegal drug use—when thousands of young lives are being destroyed by use of drugs like heroin, methedrin ("speed"), cocaine—the licensee should not be indifferent to the question of whether his facilities are being used to promote the illegal use of harmful drugs." *Ibid.*

[6] "The Commission did make clear in the Notice that the broadcaster could jeopardize his license by failing to exercise license responsibility in this area. Except as to broadcasts by political candidates, the licensee is responsible for the material broadcast over his facilities. . . . The thrust of the Notice is simply that this concept of licensee responsibility extends to the question of records which may promote or glorify the use of illegal drugs. The licensee should know whether his facilities are being used to present again and again a record which urges youth to take heroin or cocaine—that it is a wonderful, joyous experience." *Id.* at 379.

The Commission went to great lengths to illustrate what it meant by saying that a broadcaster must "know" what is being broadcast. The Order emphasizes that it is not requiring the unreasonable and that the Commission was "not calling for an extensive investigation of each . . . record"[7] that dealt with drugs. It also made clear that there was no general requirement to pre-screen records.[8]

The Commission in its Order was obviously not asking broadcasters to decipher every syllable, settle every ambiguity, or satisfy every conceivable objection prior to airing a composition. A broadcaster must know what he can reasonably be expected to know[9] in light of the nature

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[7] *Id.* at 380.

[8] As noted below, the Commission made reference to methods of compliance other than pre-screening in the Memorandum and Order. In a subsequent Order the Commission explicitly disclaimed any intention of requiring pre-screening:

> We think it appropriate to point out, however, that petitioners' repeated reference to a pre-screening requirement for each record is an erroneous interpretation of our April 16, 1971 order.

Memorandum Opinion and Order, 31 F.C.C.2d 385, 386 n.1 (1971).

[9] "We recognized in the ADL case, *supra*, that imposition of any undue verification process 'could significantly inhibit the presentation of controversial issue programming' (6 F.C.C.2d at p. 386); cf. *The Washington Post* v. *Keogh*, 365 F.2d 965 (C.A.D.C., 1966). That is equally so here. Therefore, what is required is simply reasonable and good faith attention to the problem. We would conclude this aspect as we did in the prior Notice.

> Thus, here as in so many other areas, it is a question of responsible, good faith action by the public trustee to whom the frequency has been licensed. No more, but certainly no less is called for."

31 F.C.C.2d 377, 380.

of the music being broadcast. It may, for example, be quite simple for a broadcaster to determine that an instrumental piece has little relevance to drugs. Conversely, it may be extremely difficult to determine what thought, if any, some popular lyrics are attempting to convey. In either case, only what can reasonably be understood is demanded of the broadcaster.

Despite all its attempts to assuage broadcasters' fears, the Commission realized that if an Order can be misunderstood, it will be misunderstood—at least by some licensees. To remove any excuse for misunderstanding, the Commission specified examples of how a broadcaster could obtain the requisite knowledge. A licensee could fulfill its obligation through (1) pre-screening by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public.[10] The Order made clear that these procedures were merely suggestions, and were not to be regarded as either absolute requirements or the

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[10] "Again, it may be desirable to proceed by analogy. Licensees instruct their employees that before presenting taped material containing questionable language (i.e., of an indecent or obscene nature), the matter should be brought to the attention of a responsible management official. . . . Further, while such material might be presented once in a series part of which has been screened and approved, its presentation is then picked up, either by complaint or station personnel, and a judgment made as to further presentation. So also here, disc jockeys could be instructed that where there is a question as to whether a record promotes the illegal drug usage, a responsible management official should be notified so he can exercise his judgment. It may be that a record which raises an issue in this respect is played once, but then the station personnel who have heard it will be in a position to bring it to the attention of the appropriate management official for his judgment." *Ibid.*

exclusive means for fulfilling a station's public interest obligation.[11]

Having made clear our understanding of what the Commission has done, we now take up appellant's arguments seriatim.

III. *An Unconstitutional Burden on Freedom of Speech*

Appellant's first argument is that the Commission's action imposes an unconstitutional burden on a broadcaster's freedom of speech. This contention rests primarily on the Supreme Court's opinion in *Smith* v. *California*,[12] in which a bookseller was convicted of possessing and selling obscene literature. The Supreme Court reversed the conviction. Although the State had a legitimate purpose in seeking to ban the distribution of obscene materials, it could not accomplish this goal by placing on the bookseller the procedural burden of examining every book in his store. To make a bookseller criminally liable for all the books sold would necessarily "tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature . . . ." [13]

Appellant compares its own situation to that of the bookseller in *Smith* and argues that the Order imposes an unconstitutional burden on a broadcaster's freedom of speech. The two situations are easily distinguishable.

Most obviously, a radio station can only broadcast for a finite period of twenty-four hours each day; at any one time a bookstore may contain thousands of hours' worth of readable material. Even if the Commission had ordered

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[11] *See* note 9, *supra*.

[12] 361 U.S. 147 (1959).

[13] *Id.* at 153-54.

that stations pre-screen all materials broadcast, the burden would not be nearly so great as the burden imposed on the bookseller in *Smith*. As it is, broadcasters are not even required to pre-screen their maximum of twenty-four hours of daily programming. Broadcasters have specifically been told that they may gain "knowledge" of what they broadcast in other ways.[14]

A more subtle but no less compelling answer to appellant's argument rests upon *why* knowledge of drug oriented music is required by the Commission. In *Smith*, knowledge was imputed to the purveyor in order that a criminal sanction might be imposed and the dissemination halted. Here the goal is to assure the broadcaster has adequate knowledge. Knowledge is required in order that the broadcaster can make a judgment about the wisdom of its programming. It is beyond dispute that the Commission requires stations to broadcast in the public interest. In order for a broadcaster to determine whether it is acting in the public interest, knowledge of its own programming is required. The Order issued by the Commission has merely reminded the industry of this fundamental metaphysical observation—in order to make a judgment about the value of programming one must have knowledge of that programming.

We say that the licensee must have *knowledge* of what it is broadcasting; the precise *understanding* which may be required of the licensee is only that which is reasonable. No radio licensee faces any realistic possibility of a pen-

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[14] *See* footnote 10, *supra*, and accompanying text. Appellant attempts to buttress its argument based on *Smith* by pointing to a number of cases that reject the contention that purveyors of public information are required to verify the truth of controversial statements. *See* Appellant's Brief at 41-42. Those cases are even less relevant than *Smith*. They all involve fact situations in which obtaining the needed information would be most difficult or even impossible.

alty for misinterpreting the lyrics it has chosen or permitted to be broadcast. If the lyrics are completely obscure, the station is not put on notice that it is in fact broadcasting material which would encourage drug abuse. If the lyrics are meaningless, incoherent, the same conclusion follows. The argument of the appellant licensee, that so many of these lyrics are obscure and ambiguous, really is a circumstance available to some degree in his defense for permitting their broadcast, at least until their meaning is clarified. Some lyrics or sounds are virtually unintelligible. To the extent they are completely meaningless gibberish and approach the equivalent of machinery operating or the din of traffic, they, of course, do not communicate with respect to drugs or anything else, and are not within the ambit of the Commission's order. Speech is an expression of sound or visual symbols which is intelligible to some other human beings. At some point along the scale of human intelligibility the sounds produced may slide over from characteristics of free speech, which should be protected, to those of noise pollution, which the Commission has ample authority to abate.[15]

We not only think appellant's argument invalid, we express our astonishment that the licensee would argue that before the broadcast it has no knowledge, and cannot be required to have any knowledge, of material it puts out over the airwaves. We can understand that the individual radio licensees would not be expected to know in advance the content or the quality of a network program, or a free flowing panel discussion of public issues, or other audience participation program, and certainly not a political broadcast. But with reference to the broadcast of that which is frequently termed "canned music," we think the Commission may require that the purveyors of this to the

[15] *Cf.* Noise Control Act of 1972, Pub. L. No. 92-574, 41 U.S.L.W. 179 (27 Oct. 1972).

public make a reasonable effort to know what is in the "can." No producer of pork and beans is allowed to put out on a grocery shelf a can without knowing what is in it, and standing back of both its content and quality. The Commission is not required to allow radio licensees, being freely granted the use of limited air channels, to spew out to the listening public canned music, whose content and quality before broadcast is totally unknown.

Supposedly a radio licensee is performing a public service—that is the raison d'etre of the license. If the licensee does not have specific knowledge of what it is broadcasting, how can it claim to be operating in the public interest? Far from constituting any threat to freedom of speech of the licensee, we conclude that for the Commission to have been less insistent on licensees discharging their obligations would have verged on an evasion of the Commission's own responsibilities.

By the expression of the above views we have no desire whatsoever to express a value judgment on different types of music, poetry, sound, instrumentation, etc., which may appeal to different classes of our most diverse public. "De gustibus non est disputandum." But what we are saying is that whatever the style, whatever the expression put out over the air by the radio station, for the licensee to claim that it has no responsibility to evaluate its product is for the radio station to abnegate completely what we had always considered its responsibility as a licensee. All in all, and quite unintentionally, the appellant-licensee in its free speech argument here has told us a great deal about quality in this particular medium of our culture.

IV. *The Requirement of Rulemaking*

We turn next to appellant's contention that the Commission in its Order has imposed a new duty on the broadcasting industry. If the FCC were indeed imposing a

new duty on its licensees, its action should be subject to the public debate and scrutiny of rulemaking proceedings.[16] If the Commission is simply reminding broadcasters of an already existing duty, rulemaking is not required. We conclude that the stated purpose and the actual result of the Commission's Notice and Order was to remind the industry of a pre-existing duty.

The basis for this pre-existing duty has existed since the early days of government regulation of the airways.[17] The most thorough articulation of this duty was given in the Commission's 1960 Program Policy Statement wherein it said:

> Broadcast licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. . . . This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast material for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community.[18]

This 1960 Statement and the Order challenged here are remarkably similar. Both require the broadcaster to assume responsibility for what is broadcast, that the broadcaster actively exercise his judgment in pursuit of this responsibility, and that this exercise of judgment result in

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[16] *Citizens Communications Center* v. *FCC*, —— U.S. App. D.C. ——, ——, 447 F.2d 1201, 1204 n. 5 (1971).

[17] *See, e.g., KFKB Broadcast Association* v. *Federal Radio Commission*, 60 U.S. App. D.C. 79, 81, 47 F.2d 670, 672 (1931).

[18] Report and Statement of Policy re: Commission En Banc Programming Inquiry, 25 Fed. Reg. 7291, 7295, 30 R.R. 1902, 1912-13 (1960).

programming that is in the public interest. The only real difference between the 1960 Statement and the Order under attack is that the Order (1) deals with programming as it relates to drugs rather than programming generally, and (2) specifically states that a broadcaster must have "knowledge" of what he is programming.

There is a long-standing Commission policy of reminding licensees of their responsibility in a particular area whenever there appears to be licensee indifference. A notice quite similar to the one challenged here was issued with respect to foreign language broadcasting.[19] There, a Commission inquiry had revealed that many licensees were carrying foreign language broadcasts without having any familiarity with the foreign language. Broadcasters were accordingly advised:

> Licensee responsibility requires that internal procedures be established and maintained to insure sufficient familiarity with the foreign language to know what is being broadcast and whether it conforms to the station's policies and to the requirements of the Commission's rules. Failure of licensees to establish and maintain such control over foreign language programming will raise serious questions as to whether the station's operation serves the public interest.[20]

In addition to this example, the Commission has reminded broadcasters of their obligations in a number of other specific situations.[21]

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[19] Public Notice Concerning Foreign Language Programs, 9 P. & F. Radio Regs.2d 1901 (1967).

[20] *Ibid.*

[21] *See, e.g.*, Licensee Responsibility With Respect to the Broadcast of False, Misleading or Deceptive Advertising, FCC 61-1316 (November 7, 1961).

Appellant, in its reply brief, attempts to distinguish these examples by pointing out that they deal with unique facts and are based upon different legal theories than those in-

It is entirely reasonable for the Commission to issue "reminders" referring to specific areas when such problems exist. The Commission need not content itself with repeating general policy statements when the general policy is being violated in a very specific way. It is much more logical for the Commission to point out the specific problem and then illustrate how the general policy applies in the particular situation.

It is likewise irrelevant that the current Order requires broadcasters to "know" what they are programming. Such a requirement imposes no new burden upon the broadcasting industry. Indeed, the requirement that the licensees broadcast in the public interest necessitates some sort of knowledge on their part. Undoubtedly, the only reason the Commission stressed the point in the Order was because of certain broadcasters' absurd contention that they either did not or could not know what they were broadcasting. As we noted in Part III, it cannot be argued that no knowledge has ever been required of broadcasters.

In its less extreme form appellant's contention seems to be that, although some form of knowledge has always been required, the Notice and Order impose a much greater burden of knowledge on the broadcasting industry than has previously existed. This argument is baseless. The requisite degree of knowledge is not absolute but, rather, is quite liberal. Indeed, a licensee could not do less than is asked and still fulfill its obligation to broadcast in the public interest. In sum, the main thrust of the Commission's earlier Notice and of its later Order is that whether a song presents the banal observations of a moon-struck adolescent, resembles two enraged alley cats fighting in a garbage

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volved in this case. This is true. We make use of these examples here, however, for the very limited purpose of illustrating that the Commission often draws attention to and makes statements regarding specific areas of licensee activity.

can, or contains the subtle reflections of a master poet, a licensee may not broadcast ignorant of the content of his programming.[22]

V. *Asserted Vagueness*

Perhaps the most strenuously urged and least meritorious of appellant's arguments are based upon the contention that the Commission's Order is impermissibly vague. From this common starting point, appellant argues (1) that the Order is unconstitutionally vague, or (2) that the Order is so vague that the Commission abused its discretion in refusing to clarify it.

A.

It is indisputable that generally the Government may not draw a line between permissible and impermissible speech in such an unclear and imprecise manner that "men of common intelligence must necessarily guess at its meaning and differ as to its application."[23] We shall assume for the moment that this standard applies with full force to the broadcast industry. Even under this standard the Commission's Order is not unconstitutionally vague. In fact, the Commission has done an admirable job of explaining the nature and degree of knowledge expected of broadcasters. As illustrated in Part II of this opinion, this court has no

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[22] Appellant attempts to buttress its argument that the Order imposes a new duty by pointing to the widespread use of live and network programming. The argument is that since it is impossible to know prior to broadcast what is in those types of programs, the Notice must, if it requires any knowledge at all, impose a new duty. This argument ignores the fact that the Notice imposes no absolute requirement to pre-screen or know what a record says prior to broadcast. *See* footnote 8, *supra*. Pre-screening is merely one way that a broadcaster may fulfill its obligation.

[23] *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926).

difficulty understanding what the Commission expects of its licensees.

Removed from appellant's obfuscation, the structure, purpose and requirements of the Order are quite clear. First, the Order defines what it is attempting to achieve. Secondly, it provides three examples of ways a broadcaster *may* attain this goal. Thirdly, the Order does not forbid a broadcaster from attaining the goal by another means.[24] Thus the Order avoids the constitutional infirmity of vagueness by providing explicit ways for a broadcaster to meet its requirements while simultaneously avoiding overbreadth by not limiting compliance to the methods specified.

B.

A second argument based on the alleged vagueness of the Order is that the Commission has abused its discretion in failing to clarify the nature of its requirements. Specifically, appellant charges that the Commission abused its discretion in declining to issue a declaratory judgment on the acceptability of its proposed plan for complying with the Notice.

It is clearly within the discretion of the Commission to issue a Declaratory Order on a licensee's proposal.[25] It is equally clear, however, that the Commission is not *required* to issue such a declaratory statement merely because a broadcaster asks for one.[26] There are over 7,500 radio

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[24] *See generally* the discussion in Part II of the opinion.

[25] "The agency, with like effect as in the case of other orders, *and in its sound discretion*, may issue a declaratory order to terminate a controversy or remove uncertainty." 5 U.S.C. § 554(e) (1970) (emphasis added).

[26] "[I]n applying the public interest standard to programming, the Commission walks a tightrope between saying too much and saying too little. In most areas it has resolved this dilemma by imposing only general affirmative duties—e.g., to strike a balance between the various interests of

stations in this country. If the Commission were required to pass upon, approve or disapprove, the methods of operations of each of these stations, the administrative task would be enormous. This disinclination to rule here is in accord with the Commission's long standing policy of refusing to issue interpretative rulings or advisory opinions whenever the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them.[27]

An administrative agency should not be compelled to issue a clarifying statement unless its failure to do so can be shown to be a clear abuse of discretion. Here the Commission could reasonably conclude that it had said enough and that the rest was up to the "licensee's individual responsibility for programming."[28] We will not, therefore, compel the Commission to issue a ruling on appellant's proposed plan for compliance.

VI. *Conclusion*

In spite of the horrendous forebodings which brought appellant into court the fact is that appellant has recently had its license renewed. Likewise, there has been no showing or suggestion that the standard enunciated in the Order has been employed to deny any license to a broadcaster. If such a denial does occur and can be shown to be unfair or due

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the community, or to provide a reasonable amount of time for the presentation of programs devoted to the discussion of public issues. . . . Given . . . [the Commission's] long-established authority to consider program content, this general approach probably minimizes the dangers of censorship or pervasive supervision." *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 27, 405 F.2d 1082, 1095 (1968).

[27] *See, e.g., Use of Broadcast Facilities by Candidates for Public Office*, 24 F.C.C.2d 832, 885 (1970).

[28] *Banzhaf* v. *FCC*, 132 U.S. App. D.C. 14, 27, 405 F.2d 1082, 1095 (1968).

to a misapplication of the Commission's own guidelines (as described in Part II of our opinion), then redress may be sought in the courts. Until that time, appellant might commit its energies to the simple task of understanding what the Commission has already clearly said, rather than instituting more colorful but far less fruitful actions before already heavily burdened federal courts.

For the reasons given above, the action of the Federal Communications Commission is

Affirmed.

APPENDIX C

F.C.C. 71-803

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LICENSEE RESPONSIBILITY TO REVIEW RECORDS BEFORE THEIR BROADCAST (F.C.C. 71-205, 71-428)

MEMORANDUM OPINION AND ORDER

(Adopted August 4, 1971; Released August 18, 1971)

BY THE COMMISSION: COMMISSIONER BARTLEY ABSTAINING FROM VOTING; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT.

1. The Commission has before it a petition for reconsideration of its Memorandum Opinion and Order adopted April 16, 1971, FCC 71-428,——FCC 2d——, filed jointly by Yale Broadcasting Company (WYBC-FM), University of the Pacific (KUOP-FM), Steve Leon, National Co-Ordinating Council on Drug Abuse Education and Information, Inc., Mark Gorbulew, Sara Vass, John Gorman, Kenneth P. Currier, Stuart Jackson, James H. Irwin and Charles Laquidara.

2. Our opinion of April 16, 1971 dealt with petitions for reconsideration of our Public Notice of March 5, 1971, 28 FCC 2d 409. Although we stated that our opinion on reconsideration constituted our definitive statement, the present petition alleges that there are inconsistencies between the original Public Notice and the opinion on reconsideration. It also claims that we have not made clear the precise manner in which licensees are to keep themselves informed concerning the records they play, and requests a ruling upon the adequacy of the policy adopted by Yale Broadcasting Company which is set forth at length in the petition. Finally, the petition requests a more definitive statement concerning the nature of Commission review of the licensee's judgment in playing records.

3. We do not believe that any further extended discussion is warranted. We note first that our April 16, 1971 opinion stands as our definitive statement in this area, and see no need to analyze it for alleged inconsistencies with the Public Notice of March 5, 1971. Secondly, we made amply clear upon reconsideration that we were concerned in this area with the maintenance of the "well established concept of licensee responsibility," and that it was this concern that had prompted issuance of the Public Notice. Since this concept has been enunciated again and again and has caused no apparent difficulty of understanding or implementation, and since we do not have before us a particularized situation involving a concrete application of the principle, it would not appear to be useful to attempt any additional

definition.[1] We think our previous opinion was adequately clear in this respect. The same considerations apply to the request for a definition of the Commission's reviewing role. Finally, we decline to rule upon the validity of the policy statement submitted on behalf of Yale Broadcasting Company. This policy statement is presented in the abstract. We are loath to embark upon individual rulings for individual licensees concerning their proposed handling of specific types of programming upon the basis of general policy statements not fleshed out by the licensee's actual operation. In this delicate area, we think it preferable to avoid unnecessary rulings.

4. Accordingly, the petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

In their action today, my colleagues continue to refuse to clarify their actions concerning the responsibilities of licensees who play contemporary music that contains lyrics making references to drugs.

I dissent, because I believe the Commission has missed an opportunity partially to undo the damage it has done in its prior actions. The result is a set of Commission policies which are so vague and overbroad as to continue to be impermissible under the First Amendment.

I dissented to the Commission's first action—a public notice—and my views are set out there in full. 28 F.C.C. 2d 409, 412 (1971). I also dissented to the Commission's attempt to explain its action—the April 16, 1971 order (FCC 71–428)—reconsideration of which is sought by petitioners. In my view the only way the Commission can repair the adverse effect of its public notice is clearly and directly to rescind the notice and reaffirm the Frst Amendment rights of licensees in the presentation of programming. My colleagues do not agree, and I therefore felt unable to join the very telling and commendable statement of Commissioner Bartley.

Now once again the Commission holds to a discredited action and declines to swallow its pride and admit a mistake. In a rather unusual treatment of a 37-page petition for reconsideration, the Commission declines even to address the substantive issues raised in the petition. The majority's opinion is apparently that its "definitive statement" of April 16 is sufficient answer. I do not agree.

Petitioners ask the Commission for clarification of a number of points. I will treat several.

(1) Petitioners suggest that the Commission's requirements for the exercise of what it calls "licensee responsibility" are vague, and because the requirement is to be considered in the license renewal process, such vagueness can have an inhibiting effect on the licensee's full freedom to choose his programming without the threat of government censorship. In its April order, the Commission said it would not question licensee judgments on particular records, and that all that was

[1] We think it appropriate to point out, however, that petitioners' repeated reference to a pre-screening requirement for each record is an erroneous interpretation of our April 16, 1971 order.

required was "reasonable and good faith attention to the problem"—but then paragraph 8 of the order suggests a detailed review process that would seem to require screening of every record broadcast. The majority's only response to the request for clarification is an ambiguous footnote.

(2) Petitioners ask for clarification of the Commission's standard: lyrics that "promote or glorify" illegal drugs. The majority makes no response. This is an area where particularity and examples are most helpful—if not, indeed, essential—if licensees are not to be inhibited.

(3) Petitioners ask that the Commission set forth the evidentiary rationale implicit in its prior actions—that there is such a relationship between song lyrics and the use of illegal drugs as to justify Commission intrusion of this extraordinary nature. The Commission declines to spell out the evidence justifying its prior actions.

(4) Petitioners submit a concrete proposed policy statement by a Commission licensee, asking whether or not such a station policy complies with Commission policy. I have attached that proposed policy statement as an appendix to this opinion. Finding the proposed policy statement "abstract" and not "fleshed out by the licensee's actual operation" the majority has refused to rule upon it, and concludes: "In this delicate area, we think it preferable to avoid unnecessary rulings." Would that this thought had occurred to my colleagues in March 1971. Since it did not, I think we are now obliged to give at least this much effort to remedying the confusion.

I have only sketched some of the areas where the Commission could have clarified its policies and refused to do so, because the principal problem with the Commission's action is much more general.

The principal effect of threatened governmental sanctions against the exercise of First Amendment freedoms are indirect. Even in a society as free as ours there are natural inhibitions to speaking one's mind in ways likely to alienate actual or potential institutional leaders, employers, friends and neighbors. All incentives encourage conformity, suppression of the uncomfortable truth, and the eventual atrophying of the very powers of perception and analysis upon which individuality (and a vibrant democracy) depend. All too many of those of us who are dependent upon positions in institutions are so busy trying to find out which way the mind is blowing that we don't even need to be told what is expected of us. We certainly don't need to be told twice. And when the President of the company (or the Vice President of the United States, or the Chairman of the FCC) shouts at us and tells us to stop what we're doing it takes an unusually strong (or foolish) person to go on speaking or performing as before—however deeply he feels about it. No matter how urgently we are subsequently assured that all is forgiven and that we are encouraged to "speak our minds" (or that the Administration doesn't intend to censor newsmen and suppress radical dissent, or that the FCC doesn't really mean to ban records) we have already been psychologically inhibited. The First Amendment damage has already been done.

Suppose, for example, a high school principal and teaching staff vote unanimously to ban long hair on high school males. Assume a bold student takes the ruling to court and gets it reversed as uncon-

stitutional, and that it is subsequently withdrawn by the school. How many students—dependent upon that administration and faculty for grades and college entrance recommendations—will choose to exercise their newly found legal rights (and thereby risk the possible antagonism of those upon whom they are dependent)?

So, in this case, there's really no way—under the best of circumstances—that we can get the toothpaste back in the tube once it's been squeezed out all over the wash basin. Broadcasters—courageous and cowardly alike—are a pretty skittish lot. The Administration, and the FCC, know that. Having been told—very loudly and clearly—that powerful people in Washington are interested in their records' song lyrics, all too many will go out of their way to select lyrics designed to please. At that point the Government has succeeded in its purpose: it is then safe to issue all the apologies and rescinding statements necessary to silence the critics.

Under these circumstances the very least we should do, I believe, is to issue a clear and unequivocal repudiation and withdrawal of our March 5 and April 16, 1971 Policy Statement. Even that would fail to undo the havoc we have wrought. That the majority refuses to make even such modest amends is disturbing.

APPENDIX A

Station Policy Concerning the Broadcast of Musical Recordings

Preamble

The licensee has always endeavored to comply fully with all Commission rules and with the spirit of the First Amendment and will continue to do so in the future. The licensee believes that its primary obligation is to meet the needs and desires of its listening audience. Since its audience is intelligent and sophisticated, the licensee has always attempted to present the highest quality programming. In addition to quality, the listening audience demands that this licensee not shun controversy and present diverse views on the current problems of the day. It demands that the licensee remain informed on the pressing problems of crime, race relations, war, violence, drug abuse, and poverty and that it attempt to program in a manner so as to, in turn, inform its audience.

The licensee endeavors to present a variety of musical programming which is of the highest artistic and creative quality. Our audience demands this of us.

On March 5, 1971, and again on April 16, 1971, the Federal Communications Commission issued statements expressing its concern over the indifference of some licensees to musical recordings which "promote or glorify the use of drugs." This licensee has always been aware of the critical problem of drug abuse in the community as well as nationwide. As in other areas, it has responded to the problem by informing its audience of the facts of drug abuse, and presenting programming warning of possible dangers of certain drugs. It has attempted to bring to bear intelligent and responsible comment in this crucial area.

The management and staff of this licensee continually review and evaluate programming for its relevance to current public issues and for its compatibility with the high standards we and our audience have set. This evaluation extends as well to our musical programming. Because our audience demands it, we program a variety of popular music with special concentration upon modern rock, blues, soul, jazz and folk music.

We have been and are aware that certain of this music is controversial and not approved of by certain segments of the American populace. We have been and are aware that certain of the music presents unpopular political, cultural and social ideas through the song's lyrics. Certain of the music refers to the illegal use of drugs. Since these unpopular ideas and the use of illegal drugs has created such controversy, we deem it necessary to formally reiterate our policy with respect to the presentation of musical recordings. This is done to

inform our staff and audience of the position we take with respect to our musical programming and what we require of our staff in satisfying our public obligations. This policy follows:

(a) The licensee believes that music and especially modern popular music is an important form of communication and art, and believes that its responsibilities to the public require it to present the view of the artist without restraint or censorship.

(b) The licensee endeavors to evaluate all its programming for compatibility with the needs and desires of its audience. Among the ways it does so is to employ announcers who are thoroughly familiar with modern recorded music, and who are "in touch" with current tastes and preferences.

(c) The licensee is concerned and aware of the problems of drug abuse and will always attempt to present programming which responds to this issue of current and pressing public concern. Such programming is and will be in the form of news, spot announcements and specific programming directed to this issue.

(d) Modern popular music, including rock music, is a medium of communication for the young. It reflects the cultural aspirations, and the highest and lowest ideals of youth. It is first and foremost the creative expression of the artist who views the world as he sees it and expresses this view through his music. The music is an artistic whole comprised of sound and words. More often than not the lyrics are not as important to the artist's view as is the music. The lyrics become part and parcel of the music and have no independent life of their own.

(e) Censorship of the musical artist is contrary to the policy of this licensee. To censor lyrics because of their verbal content would prevent the audience from enjoyment of other important artistic, cultural and social facets of a particular song. An announcer's obligation as an employee of the licensee is to judge the song on the basis of its overall artistic merit and to present the audience with superior music.

(f) The licensee has determined that emphasizing lyrics over other elements of an artistic musical work for the purpose of not playing it is inconsistent with the nature of the art form and the wishes of our audience who should not be deprived of the right to hear any song as long as it is of superior overall artistic merit.

(g) Because the licensee, in exercising its responsibility in this and other areas of public concern does not permit the censorship of a song because of its lyrics alone, management officials and announcers need not examine the lyrics of records but should treat it as an artistic whole. As a general rule, the announcer will have listened to the record before it is played but this will not be true in all cases. Because of the substantial number of new releases and the already large volume of records already released, it would be overly burdensome for the staff to listen to every cut of every record. The announcer may wish to play new releases after having only heard a small portion of one cut. He may wish to play a song by a particular group which he has not heard. This is consistent with the spontaneity and creativity of programming which this station desires to achieve. The staff's obligation is to program good music in a creative manner. This does not *require* the announcer to pre-screen songs, specifically listen to lyrics, determine their meaning or decide their social or moral import. He may do so if you wish if such judgment is relevant to the artistic quality of the song or to your program concept. The licensee's obligation with respect to drug abuse will be more appropriately carried out in the forum of other programming. Preauditioning for lyrical content is burdensome, completely unnecessary, and contrary to this station's policy.

(h) The licensee believes that songs, including their lyrics, are protected forms of expression under the First Amendment, and deserve to be heard by our audience without interference. Moreover, it is the obligation of the licensee to be responsive to the First Amendment rights of its audience.

(i) The licensee will continue to supervise announcers' selections of music by selective monitoring as programs are broadcast. By this procedure, management will be able to determine whether the music being played meets its standards and the standards of its audience. The licensee will continue to evaluate and reassess these standards by responding to complaints and request from its listening audience in order to continue to present music of

the highest musical and artistic quality—as judged by the licensee, its listeners, and its announcers.

(j) Announcers are hereby instructed to immediately report to a responsible management official any musical recording which contains illegal speech—such as obscene language, lotteries, and the like. Though it is unlikely that musical recordings will contain such illegal speech, you are reminded that the law prohibits the broadcast of illegal speech and you should endeavor to remain aware of this fact. Such recordings, if you become aware of them prior to broadcast, should not be played unless management has reviewed them. If you, as would be expected, become aware of illegal speech as you play the record or thereafter, the record should not be played again until management has had the opportunity to review it. Except for this obligation, announcers are reminded that they must not concern themselves with the content and meaning of record lyrics, but must devote themselves, as artists, to the musical validity of the work.

(k) The licensee believes that the above Policy comports with the obligations of licensee responsibility. This licensee is always aware of what it programs and is constantly evaluating its response to cultural, political, moral and other public concerns. Our evaluation, as reflected herein, is that our response to illegal drug use will be centered elsewhere and not in the censorship of the musical artist.

APPENDIX D

F.C.C. 71-428

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
LICENSEE RESPONSIBILITY TO REVIEW RECORDS BEFORE THEIR BROADCAST (F.C.C. 71-205)

MEMORANDUM OPINION AND ORDER

(Adopted April 16, 1971; Released April 16, 1971)

BY THE COMMISSION: COMMISSIONERS BARTLEY, H. REX LEE AND WELLS CONCURRING AND ISSUING STATEMENTS; COMMISSIONER JOHNSON DISSENTING AND ISSUING A STATEMENT (See F.C.C. 71-803 for Commissioner Johnson's statement).

1. The Commission has before it petitions for reconsideration of its Public Notice of March 5, 1971, FCC 71-205, entitled "Licensee Responsibility to Review Records Before Their Broadcast", filed by the Federal Communications Bar Association; Pierson, Ball & Dowd on behalf of Dick Broadcasting, Inc., Lee Enterprises, Inc., RKO General, Inc., and Time-Life Broadcast, Inc.; the Recording Industry Association of America (RIAA),[1] and Pacifica Foundation.[2] The latter also submitted a petition for stay. In view of this latter request and the considerations in the next paragraph, we agree that there is a need for expedited action, and therefore go directly to the merits, without summarizing the petition.

2. The Commission's public notice of March 5 stated, in most pertinent part:

> Whether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage is a question for the judgment of the licensee. The thrust of this Notice is simply that the licensee must make that judgment and cannot properly follow a policy of playing such records without someone in a responsible position (i.e., a management level executive at the station) knowing the content of the lyrics.

The Notice thus simply reflected the well established concept of licensee responsibility. However, as the petitions point up, it was widely reported in the press as a directive by the Commission not to play certain kinds of records. (E.G., "Stations Told to Halt Drug-Oriented Music", Associated Press, The Washington Evening Star, March 6, 1971; "FCC Bars Broadcasting of Drug-Linked Lyrics", United Press International, The Washington Post, March 7, 1971). Since the purpose of a public notice is to inform the industry and public of a Commission policy, it follows that where a notice is so erroneously

[1] RIAA's Motion for Acceptance of Pleading in Excess of Page Limitation IS GRANTED.
[2] We also take note that a Petition for Reconsideration was filed late by the Stern Community Law Firm and also a Memorandum of the Authors League of America, Inc. in support of RIAA's Petition for Reconsideration. These materials were received during our determination on this Memorandum Opinion and Order.

depicted, we should appropriately call attention to the error. We do so in this Memorandum Opinion and Order. While it adheres fully to the above noted established policy of licensee responsibility, this opinion treats the matter in greater detail and thus constitutes the Commission's definitive statement in this respect.

3. As the Notice stated at the outset, the Commission has received a number of complaints concerning the broadcast of records with lyrics tending to promote or glorify the use of illegal drugs. The Commission's own experience indicated that there was some tendency by broadcasters to be indifferent to the matter of licensee responsibility in this area because all that is involved is the playing of a record. The Commission therefore believed it appropriate to point up that the licensee's responsibility for the material broadcast over his facilities extends to records. Clearly, in a time when there is an epidemic of illegal drug use—when thousands of young lives are being destroyed by use of drugs like heroin, methedrine ("speed"), cocaine—the licensee should not be indifferent to the question of whether his facilities are being used to promote the illegal use of harmful drugs.

4. But nothing in the prior Notice stated, directly or indirectly, that a licensee is barred from presenting a particular type of record. On the contrary, the Notice made clear that selection of records was a matter for the licensee's judgment. Some records point up drug dangers, some may glorify drugs, some may simply reflect the drug scene as it is today. Here, as in so many programming areas, it is often a most difficult judgment whether a record promotes drug usage. Licensees could reasonably and understandably reach differing judgments as to a particular record. We stress that such an evaluation process is one solely for the licensee. The Commission cannot properly make or review such individual licensee judgments. Indeed, at renewal time our function is solely limited to a review of whether a licensee's programming efforts, on an overall basis, have been in the public interest. *Report and Statement of Policy Re: Commission En Banc Programming Inquiry*, 20 Pike & Fischer, Radio Regulation 1901 (1960); *In re Pacifica Foundation*, 36 FCC 147, 149 (1964).

5. Any attempt to review or condemn a licensee's judgment to play a particular record is, as indicated, beyond the scope of federal regulatory authority with perhaps the exception of the so-called "clear and present danger" test. In this connection, in *Anti-Defamation League of B'Nai B'rith against Radio Station KTYM*, 4 FCC 2d 190, 191, 6 FCC 2d 385 (1967),[3] the Commission stated:

> It is the judgment of the Commission, as it has been the judgment of those who drafted our Constitution and of the overwhelming majority of our legislators and judges over the years, that the public interest is best served by permitting the expression of any views that do not involve "a clear and present danger of serious substantive evil that rises far above public convenience, annoyance or unrest."[4] *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

[3] *Aff'd*, Anti-Defamation League v. FCC, 403 F. 2d 169 (C.A.D.C., 1968), *cert. denied*, 394 U.S. 930 (1969).

[4] Similarly, in Brandenburg v. Ohio, 395 U.S. 444 (1969), the Supreme Court struck down the conviction of a Ku Klux Klan leader for advocating violence at a KKK rally, stating (at p. 447):

> These later [Supreme Court] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

6. The question of formulating a definitive concrete standard is not presented in this matter. For, we hold, based on our experience and the complaints received, that whether to play a particular record in this area does not raise an issue as to which the Government may intervene. That is the reason why the Commission has not referred a single complaint concerning the playing of records with drug lyrics to licensees for their comments;[5] instead, we have informed the complainants of the provisions of Section 326. There could be extraordinary, unforeseen circumstances where the stringent requirements of the "clear and present danger" test might be met in this field. No one can today write a constitutional blueprint for every possible future happenstance and changed circumstance. It is sufficient to hold that we do not now perceive such a problem, based upon our present experience, and that our prior Notice and this Opinion are not premised upon it.

7. The Commission did make clear in the Notice that the broadcaster could jeopardize his license by failing to exercise licensee responsibility in this area. Except as to broadcasts by political candidates, the licensee is responsible for the material broadcast over his facilities. That obviously calls for a reasonable degree and exercise of responsibility. It is nonsense to assert that the licensee can be indifferent to this responsibility. If a person approaches a station to buy time to attack his neighbor, or simply to let loose a torrent of vile language, he will not be presented. While these are egregious examples of the need for licensee responsibility, the plain fact is that the licensee is not a common carrier—that the Act makes him a public trustee who is called upon to make thousands of programming judgments over his license term. The thrust of the Notice is simply that this concept of licensee responsibility extends to the question of records which may promote or glorify the use of illegal drugs.[6] A licensee should know whether his facilities are being used to present again and again a record which urges youth to take heroin or cocaine—that it is a wonderful, joyous experience. This example is egregious, but it serves to point up the obvious bedrock policy of the *responsible* public trustee. The point is that such records are not withdrawn from the area of licensee responsibility.

8. Nor are the mechanics of licensee responsibility difficult or onerous. Again, it may be desirable to proceed by analogy. Licensees instruct their employees that before presenting taped material containing questionable language (i.e., of an indecent or obscene nature), the matter should be brought to the attention of a responsible management official (see *Eastern Educational Radio*, 24 FCC 2d 408, 414 (1970)). We note that this is the policy of petitioner Pacifica. See *In re*

[5] It has come to our attention that pursuant to a request by a broadcasting station's news department, a Commission employee furnished it with the titles of some songs which had been among those included in a presentation to the Commission some months ago by the Department of the Army. The song titles, furnished in response to the station's inquiry, comprised, as was made clear to the station at the time, "A partial list of song titles brought to the attention of the FCC in connection with the subject of so called drug-oriented song lyrics." We wish to make it clear that such list does not represent any official or even unofficial pronouncement by the Commission, and will not be circulated, utilized or applied by us in any manner whatsoever. The Commission has made no judgment on any song and most emphatically has not compiled or issued any list of songs which it believes should not be broadcast. Nor does it intend to do so in the future.

[6] We thus fully agree with the FCBA position that the Commission should make clear ". . . it was announcing a policy dealing solely with licensee responsibility to be familiar with what the licensee is broadcasting and that it did not intend to pass judgment on the desirability of broadcasting any song . . ." (p. 8, FCBA petition).

Pacifica Foundation, 36 FCC 147, 150 (1964). Further, while such material might be presented once in a series part of which has been screened and approved, its presentation is then picked up, either by complaint or station personnel, and a judgment made as to further presentation. So also here, disc jockeys could be instructed that where there is a question as to whether a record promotes the illegal drug usage, a responsible management official should be notified so he can exercise his judgment. It may be that a record which raises an issue in this respect is played once, but then the station personnel who have heard it will be in a position to bring it to the attention of the appropriate management official for his judgment. Finally, we are not calling for an extensive investigation of each such record. We recognized in the *ADL* case, *supra*, that imposition of any undue verification process "could significantly inhibit the presentation of controversial issue programming" (6 FCC 2d at p. 386); cf. *The Washington Post* v. *Keogh*, 365 F. 2d 965 (C.A.D.C., 1966). That is equally so here. Therefore, what is required is simply reasonable and good faith attention to the problem. We would conclude this aspect as we did in the prior Notice.

Thus, here as in so many other areas, it is a question of responsible, good faith action by the public trustee to whom the frequency has been licensed. No more, but certainly no less is called for.

9. We think that the foregoing is dispositive of the major arguments presented. The licensee is not a book store, but a public trustee of an inherently limited resource who is fully responsible for its operation in the public interest. We have made clear that we are not seeking through a euphemism, license responsibility, to effect the wholly improper result of barring certain kinds of speech. We have imposed no onerous requirements in this respect, and have further stressed that the judgment whether to play a particular record is to be made by the licensee alone. We have noted the arguments that some licensees have dropped all records referring to drugs—in erroneous reaction to our Notice. If that is the case, we trust that with the issuance of this opinion such licensees will cease such grossly inappropriate policy and rather will make a judgment based on the particular record. Finally, to the argument that suggests impropriety in our issuance of a Notice concerning the need for licensee responsibility in the area of records promoting drugs, the short answer is set forth in par. 3, *supra*—that this is an area of great concern in view of the epidemic proportions of the problem, that we had numerous complaints, and that we had some indication of licensee indifference because all that is involved is the playing of records. We have in the past issued similar Notices when there was indifference to the policy of licensee responsibility in other areas. See, e.g., Public Notice concerning Foreign Language Programs adopted March 22, 1967, FCC 67–368, 9 R.R. 2d 1901. Of course, the policy of licensee responsibility is applicable generally, but that does not mean that we cannot issue appropriate Notices when there is an indicated need therefor.

10. An argument is also advanced as to the necessity for rule making notice under the Administrative Procedure Act. But our Notice

establishes no new rule or indeed even a new policy. It reiterates an established bedrock policy—licensee responsibility. If this opinion were withdrawn, licensees would still be required to observe that policy based on scores of prior decisions. We therefore do not perceive how the rule making notice requirements of the APA are at all applicable here.

11. As a final point, we wish to stress that the issue of drug lyrics is but one facet of the overall drug problem, and it would be unfortunate if it were to be blown out of proportion. For, consideration of this aspect is, of course, not the be-all and end-all of what a broadcaster can do to serve the public interest in this important area. The public generally is now aware of the existence of the drug abuse problem. The alert has been sounded, and broadcasters have played an important role in informing the public. The present challenge and opportunity, for those broadcasters who wish to help, is to inform our citizens as to what can be done to find solutions to the problem of drug abuse. Indeed, because the drug problem is complex, and fraught with emotion, there is the possibility of a good deal of misinformation being circulated. Broadcasters who develop their own materials and programs relating to drug abuse could, if they wish, consult with experts in the field, both in the public and private sectors to insure the accuracy and reliability of their programming. In short, we believe that licensees can play a constructive role in helping the nation seek solutions to the drug problem, just as many of them have done, through public service time, in alerting the nation to the existence of the problem.

12. Accordingly, the request of Pacifica for stay IS DENIED, in view of the above discussion. The requests of the petitioners IS GRANTED to the extent reflected above (see, e.g., footnote 6, *supra*; pp. 9–10, Pierson, Ball & Dowd petition), and in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

CONCURRING STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

This Memorandum Opinion and Order purports to return to the situation prior to release of the Public Notice of March 5, 1971. To the extent that it does so, I concur in the action here taken.

CONCURRING OPINION OF COMMISSIONER H. REX LEE

I originally concurred in the Public Notice concerning the broadcast of recorded lyrics tending to promote or glorify the use of drugs because I strongly believed that every licensee should be reminded of the general responsibility for program material. However, I did have some concern that the Notice might be misunderstood, and so stated in my concurring statement. This has happened. The Notice has attracted a wide divergence of opinion and considerable confusion about its meaning.

I am concurring in this Order because it supersedes and clarifies the meaning of the original Public Notice. I construe this action to mean the Commission is merely reaffirming its *1960 Program Policy Statement* covering the general area of licensee responsibility. In my view this reaffirmation has the effect of notifying the broadcasting industry that recorded music and musical lyrics are not being singled out for separate or different treatment than the licensee is generally required to accord all broadcast programming. I do not believe the Commission ever intended more, nor that it now intends some higher degree of control which requires broadcast licensees to assess their programming with an eye to what they believe the Commission may or may not want broadcast.

CONCURRING STATEMENT OF COMMISSIONER ROBERT WELLS

I joined in the initial public notice concerning drug lyrics. I did not interpret it as an attempt to censor. That is not the role of the Commission. This is so stated by law. I intended the notice to be a restatement of the long established principle that licensees are responsible for knowing what they broadcast. The press reporting of the notice was generally inaccurate and reaction of the affected industries was overstated. I concur in this Memorandum Opinion and Order which I trust will clarify the public notice.

It should be apparent to licensees and to the Commission that the mere task of distinguishing which records do, in fact, glorify the use of drugs is an impossible assignment. Interpretations are too varied for any agency or individual to attempt to be the arbiter of the public taste. For those who would find sinister motives of a governmental agency in this document, let me call particular attention to Paragraph 4 which says in part, "We stress that such an evaluation process (selection of records to be played) is one solely for the licensee. The Commission cannot properly make or review such individual licensee judgments."

APPENDIX E

F.C.C. 71-205

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
LICENSE RESPONSIBILITY TO REVIEW RECORDS
BEFORE THEIR BROADCAST

MARCH 5, 1971.

The Commission, by Commissioners Burch (Chairman), Robert E. Lee, Johnson, H. Rex Lee, Wells and Houser, with Commissioner Johnson dissenting and issuing a statement, Commissioners Robert E. Lee, H. Rex Lee and Houser issuing statements, and Commissioner Bartley abstaining from voting, issued the following PUBLIC NOTICE.

LICENSEE RESPONSIBILITY TO REVIEW RECORDS BEFORE THEIR BROADCAST

A number of complaints received by the Commission concerning the lyrics of records played on broadcasting stations relate to a subject of current and pressing concern: the use of language tending to promote or glorify the use of illegal drugs as marijuana, LSD, "speed", etc. This Notice points up the licensee's long-established responsibilities in this area.

Whether a particular record depicts the dangers of drug abuse, or, to the contrary, promotes such illegal drug usage is a question for the judgment of the licensee. The thrust of this Notice is simply that the licensee must make that judgment and cannot properly follow a policy of playing such records without someone in a responsible position (i.e., a management level executive at the station) knowing the content of the lyrics. Such a pattern of operation is clearly a violation of the basic principle of the licensee's responsibility for, and duty to exercise adequate control over, the broadcast material presented over his station. It raises serious questions as to whether continued operation of the station is in the public interest, just as in the case of a failure to exercise adequate control over foreign-language programs.[1]

In short, we expect broadcast licensees to ascertain, before broadcast, the words or lyrics of recorded musical or spoken selections played on their stations. Just as in the case of the foreign-language broadcasts, this may also entail reasonable efforts to ascertain the meaning of words or phrases used in the lyrics. While this duty may be delegated by licensees to responsible employees, the licensee remains fully responsible for its fulfillment.

[1] See Public Notice concerning Foreign Language Programs adopted March 22, 1967, FCC 67-368, 9 R.R. 2d 1901.

Thus, here as in so many other areas, it is a question of responsible, good faith action by the public trustee to whom the frequency has been licensed. No more, but certainly no less, is called for.

Action by the Commission February 24, 1971. Commissioners Burch (Chairman), Wells and Robert E. Lee with Commissioner Lee issuing a statement, Commissioners H. Rex Lee and Houser concurring and issuing statements, Commissioner Johnson dissenting and issuing a statement, and Commissioner Bartley abstaining from voting.

STATEMENT OF COMMISSIONER ROBERT E. LEE

I sincerely hope that the action of the Commission today in releasing a "Public Notice" with respect to *Licensee Responsibility to Review Records Before Their Broadcast* will discourage, if not eliminate the playing of records which tend to promote and/or glorify the use of illegal drugs.

We are all aware of the deep concern in our local communities with respect to the use of illegal drugs particularly among the younger segment of our population. Public officials, at all levels of government, as well as all interested citizens are attempting to cope with this problem.

It is in this context that I expect the Broadcast Industry to meet its responsibilities of reviewing records before they are played. Obviously, if such records promote the use of illegal drugs, the licensee will exercise appropriate judgment in determining whether the broadcasting of such records is in the public interest.

CONCURRING STATEMENT OF COMMISSIONER H. REX LEE

While the title of the notice seemingly applies to the licensee's responsibility to review all records before they are broadcast, the notice itself is directed solely at records which allegedly use "language tending to promote or glorify the use of illegal drugs. . . ."

Although I am concurring, I would have preferred it if the Commission had not decided to restrict today's notice to so-called "drug lyrics." The Commission may appear to many young people as not being so concerned with other pressing broadcasting problem areas. And to many of these young people (and not just to that segment who use illegal drugs) the Commission may appear as "an ominous government agency" merely out to clamp down on *their* music.

A preferable approach would have been to repeat, with an additional reference to drug abuse of all kinds, our *1960 Program Policy Statement* wherein we stated:

> Broadcasting licensees must assume responsibility for all material which is broadcast through their facilities. *This includes all programs and advertising material which they present to the public.* . . . This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast material for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community.[1]

(Emphasis added.)

[1] *Report and Statement of Policy re: Commission En Banc Programming Inquiry*, FCC 60-970, 20 R.R. 1901, 1912-1913 (July 27, 1960).

Because of the Commission's expressed concern with the drug problem, I would hope that we could initiate action with other appropriate Federal agencies to require a reassessment by pharmaceutical manufacturers, advertisers, and the media, looking toward the reform of advertising practices in the non-prescription drug industry. *Advertising Age* expressed its concern with the increased use of drugs—both the legal and illegal types—when it stated in an editorial:

> **With an estimated $289,000,000 being spent annually on TV advertising of medicines, this serious question is being raised: Is the flood of advertising for such medicines so pervasive that it is convincing viewers that there is a medical panacea for any and all of their problems, medical and otherwise? Are we being so consistently bombarded with pills for this and pills for that and pills for the other thing that we have developed a sort of Pavlovian reaction which makes us reach for a pill everytime we are faced with an anxious moment, be it of physical or psychic origin?**[1]

Drug abuse *is* a serious problem in the United States. It is found in every sector of the population, not merely among the young who listen to hard rock music.

I believe the broadcasting industry has made a good start in helping to discourage illegal drug abuse. Many local radio and television stations and the four networks have broadcast documentaries and specials, carried spot announcements, helped to raise funds for local drug abuse clinics and information centers, and have helped to establish "tie-lines" and "switchboards" where all people can call for free medical and psychological help and guidance. These activities represent "communicating" in the best sense of the word.

My concurrence in this notice, therefore, should not be regarded as a reflection on the good start that I think most broadcasters have made in dealing with this problem. They must continue with even more determination and support from everyone.

CONCURRING STATEMENT OF COMMISSIONER THOMAS HOUSER

I join in the sentiments expressed in the concurring statement of Commissioner Robert Lee and concur in the action taken by the majority.

I take this opportunity, however, to emphasize that the positive action taken by the Commission with regard to popular song lyrics is only a portion of a much larger problem which I intend to bring to the Commission's attention for future deliberation. It is my fear, and the concern of many prominent Americans, that we are rapidly becoming a "pill oriented society". We are constantly bombarded with advertisements which would have us believe that life's problems can be solved by swallowing a pill. We are told by the "pill pushers" that we can "feel brighter" or be "give(n) a lift"—that our tensions will be relieved and that there is a pill for virtually every mood. Our children are told that pills are playful "Pals". Indeed one leading advertising executive advocates using "the idiom of the 18 year old (to) wrap" a "hard" drug sell in "a velvet glove".

To the extent that broadcast media contributes, wittingly or unwittingly, to the drug problem, the Commission is charged with the responsibility of insuring that the public interest will prevail through our recognition of the problem and the consideration of solutions.

[1] *Advertising Age*, May 11, 1970, p. 24.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

This public notice is an unsuccessfully-disguised effort by the Federal Communications Commission to censor song lyrics that the majority disapproves of; it is an attempt by a group of establishmentarians to determine what youth can say and hear; it is an unconstitutional action by a Federal agency aimed clearly at controlling the content of speech.

Under the guise of assuring that licensees know what lyrics are being aired on their stations, the FCC today gives a loud and clear message: get those "drug lyrics" off the air (and no telling what other subject matter the Commission majority may find offensive), or you may have trouble at license renewal time. The majority today approves a public notice which (1) singles out as "a subject of current and pressing concern: the use of language tending to promote or glorify the illegal use of drugs such as marijuana, LSD, 'speed,' etc.:" (2) emphasizes the importance of "someone in a responsible position . . . knowing the content of the lyrics;" and (3) raises the specter of loss of license unless the "pattern of operation" is such that a "responsible" employee knows the content of song lyrics played on broadcasting stations.

The contrived nature of this offensive against modern music is demonstrated by the fact that, as the majority itself concedes, "the licensee's responsibility for, and duty to exercise adequate control over, the material presented over his station," is "a basic principle" of FCC regulation; it is so basic that today's action is completely unnecessary. Licensees (that is, owners of stations) simply *can't* listen to *everything* broadcast over their stations; they have to delegate responsibility for knowledge of content to their employees; and we can assume under existing regulations that those employees *do* know what is being played. We can also assume that licensees are well aware of the Commission's power to prohibit material that falls within statutory prohibitions and beyond constitutional protection. Why, then, this focus on "language strongly suggestive of, or tending to glorify, the illegal use of drugs . . ."—whatever that means—unless the intention is in fact to censor by threat what cannot be constitutionally prohibited?

Moreover, there is a serious question as to whether the majority is in fact really as concerned about drug abuse as it is in striking out blindly at a form of music which is symbolic of a culture which the majority apparently fears—in part because it totally fails to comprehend it. If the majority were in fact concerned about drug abuse, they surely would not choose to ignore song lyrics "strongly suggestive of, and tending to glorify" the use of alcohol, which is the number one drug abuse problem in this country.

It is common knowledge that drunken drivers kill *each year* nearly as many Americans as have been killed during the entire history of the war in Southeast Asia. There are more alcoholics in San Francisco alone than there are narcotics addicts in the entire country. Kenneth Eaton, Deputy Director of the Division of Alcohol Abuse and Alcoholism at the National Institute of Mental Health, recently declared: "In relative terms, the physical consequences of heavy drinking are far larger and more serious than those of heroin use;" he added

that the likelihood of death in withdrawal from chronic alcoholism is much greater than in withdrawal from heroin addiction.[1] Dr. Robert L. Dupont, Director of the Washington, D.C. Narcotics Treatment Agency, agrees "absolutely" with Eaton:

> It's non-controversial.
> Heroin as a drug is really quite benign compared to alcohol, which is a poison.
>
> • • • • • • •
>
> We have two really serious drug problems in Washington, heroin and alcohol.[2]

I do not think it's the business of the FCC to be discouraging or banning *any* song lyrics. But if the Commission majority is *really* interested in doing something about the drug problems in this country, and is not just striking out at the youth culture, why does it ignore songs like "Day Drinking":

> • • • You know we just stopped in for one short snort
> Hey we are out on a binge
> Hey we got no troubles just doing our number
> Day drinking again
> Day drinking again
> I'm starvin' to death
> We've been drinkin' since ten
> Food is fattening
> Ah, but then, booze is happening
> Day drinking again [3]

or "California Grapevine":

> Well I'm sittin' on a bar stool drinkin'
> Somewhere way downtown
> Well my moneys all gone and I been here so long
> I've forgotten why I came to town
> I want to tell you
> Son, I know you're gonna find
> There ain't nothin' any sweeter or wetter than
> they grow on the California Grapevine [4]

or countless other similar lyrics? [5]

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[1] *The Washington Post*, Feb. 7, 1971, p. A7, col. 1.

[2] *Id.*

[3] T. T. Hall, "Day Drinking" (© 1970, Newkeys Music, Inc.), *Song Hits*, March 1971, p. 43.

[4] H. J. Joy, "California Grapevine" (© 1970, Blue Book Music), *Song Hits*, February 1971, p. 43.

[5]
> Lady I'm looking for a jukebox
> A bar stool that fits my bottom side
> These streets are too dark for walking
> I'm in no condition to ride
> This midnight rider lost his saddle
> And I'm in, no mood, for thinking
> I need some liquid consolation
> This night ain't fit for nothing but drinking.

T. T. Hall, "This Night (Ain't Fit for Nothing But Drinking)" (© 1970, Newkeys Music, Inc.) *Song Hits*, November 1970, p. 41.

> Blues sells a lot of booze
> Blues sells the booze and so I'm buying
> And you gave me these blues
> That's why I'm crying and dying
> Somewhere, somebody's breaking someone's heart
> But I guess they're only doing their part
> These people need their jobs who haul and sell
> And serve the brews and blues sells an awful lot of booze.

H. X. Lewis, G. Sutton, "Blues Sells a Lot of Booze" (© 1970, Al Gallico Music Corp.) *Song Hits*, March 1971, p. 45.

> And my doctor says if I don't quit drinking
> It's gonna kill me
> But I know a whole lot more old drunks than old doctors.

J. Owen, "Here Come the Elephants" (© 1970, Bluebook Music Co.) *Song Hits*, May 1971, p. 40.

And why has the Commission chosen to focus on record lyrics and yet ignore commercials which use language "tending to glorify the use of drugs generally"? In asking Congress for a study of the effects on the nation's youth of nearly $300 million worth of annual drug advertising on television, Senator Frank Moss of Utah has said:

> The drug culture finds its fullest flowering in the portrait of American society which can be pieced together out of hundreds of thousands of advertisements and commercials. It is advertising which mounts so graphically the message that pills turn rain to sunshine, gloom to joy, depression to euphoria, solve problems, dispel doubt.
>
> Not just pills; cigarette and cigar ads; soft drink, coffee, tea and beer ads—all portray the key to happiness as things to swallow, inhale, chew, drink and eat.[6]

Commissioners Rex Lee and Thomas Houser have expressed similar concerns in this very proceeding. How can anyone possibly justify the FCC's failure to examine the impact of commercials such as the following on television:

> (Music) ANNOUNCER: Leave your feeling of tension behind and step into a quiet world. You'll feel calmer, more relaxed with Quiet World. The new modern calmative. Each tablet contains a special calming ingredient plus a tension reliever to let you feel relaxed. More peaceful. So leave your feeling of tension behind with Quiet World. The new modern calmative.[7]

This commercial was broadcast over WCBS–TV in New York at 3:25 p.m. to an audience made up primarily of mothers and children. Why do the majority choose to ignore these gray flannel pushers?[8]

The answer to these questions is simple: the exclusive concern with song lyrics is in reality an effort to harass the youth culture, a crude attempt to suppress the anti-establishment music of the counter-culture and the "movement."

It is a thinly veiled political move. This Administration has, for reasons best known to the President, chosen to divert the American people's attention to "the drug menace," and away from problems like: the growing Southeast Asian war, racial prejudice, inflation, unemployment, hunger, poverty, education, growing urban blight, and so forth. When the broadcasters support this effort they are taking a political stance. Especially is this so when they, simultaneously, keep *off* the air contrary political views.[9] When we encourage this trend, we are taking equally political action.

The majority's interest in the whole song lyrics issue was substantially increased by the Defense Department's Drug Briefing, which was originally prepared for a briefing of radio and record executives under the President's auspices at the White House. It is not surprising that the Nixon Administration and the Defense Department, two primary targets of the youth culture, should try to strike back. But it is revealing and somewhat frightening that many of the song lyrics

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[6] *Year of Challenge, Year of Crisis*, The du Pont-Columbia University Survey of Broadcast Journalism 1969–1970, at 88.

[7] Shown on "To Tell the Truth," WCBS–TV, New York, Sept. 9, 1968, 3:25 p.m.

[8] It cannot be argued that the illegality of the drugs is the reason behind the majority's action, since the majority says nothing at all about lyrics extolling other illegal activities, such as cohabitation.

[9] See, *Fairness Doctrine Ruling*, 25 F.C.C. 2d 242, 249 (1970); N. Johnsen, "Public Channels and Private Censors," *The Nation* (March 23, 1970) p. 329; N. Johnson, "The Wasteland Revisited," *Playboy* (Dec. 1970), p. 229; N. Johnson, *How to Talk Back to Your Television Set* 71 (1970).

singled out as objectionably pro-drug-use by the White House and Defense Department turn out, in fact, to have nothing whatsoever to do with drugs. They relate instead to social commentary. Thus, the Defense Department spokesmen singled out a song by the Doors which says: "War is out—peace is the new thing." The White House finds alarming another which says:

> Itemize the things you covet
> As you squander through your life
> Bigger cars, bigger houses,
> Term insurance for your wife. . . .[10]

Is anything that attacks the values of corporate America or the military-industrial-complex now to be interpreted by the FCC and broadcasters as an incitement to drugs?

Beyond the hypocrisy of this blind attack on the youth culture, this action is legally objectionable because it ignores the Supreme Court's ruling that the First Amendment protects speech which has any socially redeeming importance. People differ as to how they feel about the reasonableness of the drug life as a way out of the often absurd qualities of life in a corporate state. I happen to believe in getting high on life—the perpetual high without drugs.[11] But no one can argue that the use of drugs—by rich and poor, middle-aged and young—is not a controversial issue of public importance today. How can the FCC possibly outlaw the subject as suitable for artistic comment? How can it possibly repeal the applicability of the fairness doctrine to this subject?

The courts have frequently invalidated licensing schemes which give the licensing agency such unbridled discretion, or which are so broad, that a licensee is deterred from engaging in activity protected by the First Amendment. Thus, in *Weiman v. Updegraff*, 344 U.S. 183, 195 (1952), a case involving loyalty oaths demanded of prospective teachers, the Supreme Court condemned the provision, saying: "It has an unmistakable tendency to chill that free play of spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

As Mr. Justice Black has written:

> [A] statute broad enough to support infringement of speech . . . necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others.

Barenblatt v. United States, 360 U.S. 109, 137 (1959) (dissenting opinion). This danger, inherent in the overbroad and necessarily vague action which the Commission takes today, is compounded when it involves the natural sensitivity of those whose very existence depends on the licensing power of the censoring agency.

Simply by announcing its concern with the content of song lyrics as they relate to drugs, the Commission is effectively censoring pro-

[10] Transcript of White House Radio Producers Briefing, Aug. 31, 1970, presented in the same form to the FCC, Dec. 9, 1970, p. 4 and lyrics of appendix, p. 1.

[11] See, N. Johnson, "Life Before Death in the Corporate State," Barbara Weinstock Lecture, University of California, Berkeley, California, Nov. 5, 1970 (FCC 57177); N. Johnson, "The Careening of America or How to Talk Back to Your Corporate State," Poynter Fellow Lecture, Yale University, New Haven, Connecticut, March 8, 1971 (FCC 64807).

tected speech. The breadth of the regulation is aggravated by the vagueness of the standard used—"tending to glorify." What does that mean? It could include "Up, Up and Away" sung by the Mormon Tabernacle Choir. Some so-called "drug lyrics" are clearly *dis*couraging the use of drugs. Others, while less clear, can most reasonably be read to be opposing drug usage. Many informed people argue that even the programs and public service spots designed to *discourage* drug usage are often as likely to have the opposite effect. How is the poor licensee to know which lyrics are "tending to glorify"? Will he risk his license over such an interpretation?

In *Burstyn v. Wilson*, 343 U.S. 495 (1952), a statute which authorized denial of a license if the licensor concluded that the film reviewed was "sacrilegious" was held by the Supreme Court to be an unconstitutionally overbroad delegation of discretion. The Commission's action today is bound to be interpreted as a threat that the playing of certain song lyrics could threaten license renewals.

Justice Brennan summarized the Supreme Court's concern with actions which have a "chilling effect" on the exercising of rights protected by the First Amendment:

> To give these freedoms the necessary "breathing space to survive," . . . [w]e have molded both substantive rights and procedural remedies in the face of varied conflicting interests to conform to *our overriding duty to insulate all individuals from the "chilling effect" upon exercise of First Amendment freedoms* generated by vagueness, overbreadth and unbridled discretion to limit their exercise.

Walker v. City of Birmingham, 388 U.S. 307, 344–45 (1967) (dissenting opinion) (emphasis added). This is a classic case of Federal agency action which is bound to have a "chilling effect" on the exercise of First Amendment rights.

The Commission's action today will have a chilling effect on the free spirit of our songwriters, because of the caution and timidity which today's action will produce among licensees. It will have a similar effect on the record industry, because of the relationship between the radio play of a record and its economic success. And where, after all, do we get authority to regulate *that* industry by putting pressure on the move to require the printing of lyrics on dust jackets?

We are more dependent upon the creative people in our society than we have ever fully comprehended. "Legalize Freedom" says the latest bumper sticker. Full human flowering requires the opportunity to know, and express creativity, one's most honest-as-possible self. Governments are instituted among men—according to our Declaration of Independence—to promote "life, liberty, and the pursuit of happiness." We seem to have drifted quite a way from that goal. Not only do we need creative freedom to promote individual growth, we also need creative artists to divert social disaster. The artists are our country's outriders. They are out ahead of our caravan, finding the mountain passes and the rivers. They pick up the new vibrations a decade or more before the rest of us, and try to tell us what's about to happen to us as a people—in the form of painting, theater, novels, and in music. In order to function at all, they have to function free. When we start the process of Kafkaesque institutional interference with that

freedom—whether by Big Business or Big Government—we are encouraging, rather than preventing, the decline and fall of the American Empire: its view of the future, and the fulfillment of its people.

I hope the recording and broadcasting industries will have the courage and commitment to respond to this brazen attack upon them with all the enthusiasm it calls for. Given the power of this Commission, I am afraid they may not.

For all these reasons, I dissent.

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506-814—73——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1495

YALE BROADCASTING COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a–26a) and the *per curiam* order of that court denying rehearing *en banc* (Pet. App. 1a–9a) are not yet reported. The orders of the Federal Communications Commission (Pet. App. 39a–47a, 33a–38a, and 27a–32a) are reported at 28 F.C.C. 2d 409, 31 F.C.C. 2d 377, and 31 F.C.C. 2d 385.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1973. The Chief Justice extended the

time within which to file a petition for a writ of certiorari to and including May 4, 1973, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is consistent with the First Amendment for the Federal Communications Commission to remind broadcasters that their public interest responsibility to know what is broadcast over their own stations includes making reasonable efforts to determine whether recorded songs promote the illegal use of drugs, and thus to make an informed judgment concerning the wisdom of broadcasting such records.

2. Whether the Federal Communications Commission properly exercised its discretion in refusing to issue a declaratory ruling on whether a particular broadcaster's operating plans would conform to the Commission's policy requiring reasonable attention by licensees to the lyrics of records they broadcast.

STATEMENT

After receiving numerous complaints concerning broadcasts of recorded songs which allegedly promoted the use of illegal drugs, the Federal Communications Commission, on March 5, 1971, issued a Public Notice (Pet. App. 39a–47a) dealing with this subject. The notice was intended to remind broadcasters of their long-established responsibility "to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug use" (Pet. App. 11a).

Requests for reconsideration filed by several parties, including petitioners, indicated that some persons in the broadcasting industry had interpreted the Public Notice as a directive not to play certain types of records. To correct this misunderstanding, the Commission on April 16, 1971, adopted a Memorandum Opinion and Order giving a "definitive statement" of its position (Pet. App. 33a–38a). The thrust of the April 16 Order was that: "(1) the Commission was not prohibiting the playing of 'drug oriented' records, (2) no reprisals would be taken against stations that played 'drug oriented' music, but (3) it was still necessary for a station to 'know' the content of records played and make a 'judgment' regarding the wisdom of playing such records" (Pet. App. 12a).

While the Commission expected licensees to know what they played over the air, it did not require extensive investigation of each record, nor did it expect broadcasters to decipher every syllable or to resolve every ambiguity prior to broadcast; and it did not establish any general requirement to pre-screen records (Pet. App. 14a). Solely by way of suggestion, it did identify some procedures a broadcaster might follow: (1) pre-screening by a responsible station employee, (2) monitoring selections while they were being played, or (3) considering and responding to complaints made by members of the public (Pet. App. 36a; 15a). Ultimately, however, the Commission required "reasonable, good faith action by the public trustee to whom the frequency has been licensed. No more, but certainly no less is called for" (Pet. App. 36a).

Petitioners then sought reconsideration, and petitioner Yale Broadcasting additionally requested a declaratory ruling on the adequacy of its proposed policy statement on the broadcasting of musical records (see Pet. App. 30a–32a). The Commission denied reconsideration on the ground that its April 16 Order was clear and definitive (Pet. App. 27a). It declined to rule on the validity of Yale's proposed policy because it was presented in the abstract without having been "fleshed out by the licensee's actual operation" (Pet. App. 28a).

On petition for review, the court of appeals unanimously affirmed (Pet. App. 10a–26a). Viewing the April 16 Order as having superseded the earlier policy statement (Pet. App. 13a), the court found that the Commission's action was a reminder to licensees that in the performance of their obligation to broadcast in the public interest they should appraise the potential impact of drug-oriented lyrics, and that the order embodied the "common-sense observation that in order to make this considered judgment a broadcaster must 'know' what it is broadcasting" (*ibid.*). This reminder, it noted, was consistent with long-standing Commission policy that licensees are responsible for what they broadcast (Pet. App. 20a–21a). The court rejected, on two grounds, petitioners' argument that the Commission's order is inconsistent with *Smith* v. *California*, 361 U.S. 147. First, the burden placed on licensees here is far less onerous than that placed on booksellers in *Smith*. Second, in order for

a licensee to know whether it is broadcasting in the public interest, "knowledge of its own programming is required" (Pet. App. 17a).

The court also upheld the Commission's refusal to issue a declaratory ruling on Yale Broadcasting's proposed policy. It held that the issuance of such a ruling was in the agency's discretion, and that it had not abused that discretion in refusing to rule in the abstract on a station's operating methods where it reasonably concluded "that it had said enough and that the rest was up to the 'licensee's individual responsibility for programming'" (Pet. App. 25a).

Petitioners did not seek rehearing. However, a motion for rehearing *en banc* was initiated by a member of the full court and was denied with one dissent (Pet. App. 1a).

ARGUMENT

This case presents no issue warranting review by this Court. The Commission's Orders, unanimously affirmed by the court of appeals, are no more than a restatement of the well-settled principle that a broadcast licensee in the discharge of its obligation to operate in the public interest has the responsibility to know the content of its programming. See *National Broadcasting Co.* v. *United States*, 319 U.S. 190; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367; *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, No. 71-863, decided May 29, 1973.

1. The Commission's Order reminds licensees of

their established obligation to know what they broadcast.[1] As the court of appeals stated (Pet. App. 13a):

> The Order recognizes the gravity of the drug abuse problem in our society. From this basis, the Order proceeds to remind broadcasters that they may not remain indifferent to this severe problem and must consider the impact that drug oriented music may have on the audience. The Commission then makes the common sense observation that in order to make this considered judgment a broadcaster must "know" what it is broadcasting.

Thirty years ago this Court sustained the Commission's view that a broadcast license to operate on the public airwaves imposes a responsibility upon the licensee to know the content of its own programming and to determine whether that programming serves the needs and interests of its community. *National Broadcasting Co.* v. *United States*, 319 U.S. 190. In that case the Court affirmed the Commission's chain broadcast-

[1] See, *e.g.*, the Commission's 1960 *Programming Policy Statement*, which the court below characterized as the "most thorough articulation of this duty" (Pet. App. 20a):

"Broadcast licensees must assume responsibility for all material which is broadcast through their facilities. This includes all programs and advertising material which they present to the public. * * * This duty is personal to the licensee and may not be delegated. He is obligated to bring his positive responsibility affirmatively to bear upon all who have a hand in providing broadcast material for transmission through his facilities so as to assure the discharge of his duty to provide acceptable program schedule consonant with operating in the public interest in his community." (Pet. App. 20a, quoting from Commission's *en banc*, *Network Programming Inquiry —, Report and Statement of Policy*, 25 Fed. Reg. 7291, 7295 (1960)).

ing regulation designed to insure that licensees have the practical opportunity to reject network programs.[2] The premise of that regulation, affirmed by this Court, was that:

> "[A] licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory." [319 U.S. at 206.]

Just as a licensee cannot fulfill its duties by simply accepting network programming without any knowledge of its contents, here the Commission and the court of appeals concluded that a broadcaster does not meet its responsibilities by simply broadcasting recorded songs without knowing, before, during, or after their broadcast, whether such programming constitutes a service or disservice to the public.

In *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, this Court observed that broadcasters, as trustees of a scarce and valuable national resource, have an affirmative obligation to make informed programming decisions. Broadcast licensees also have an affirmative duty to select program material which will provide their communities with suitable access to "social, political, esthetic, moral, and other ideas and experiences" (395 U.S. at 390). And only last month this Court

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[2] The Commission has adhered to the principle articulated in its chain broadcasting regulation. See, *e.g.*, *Programming Policy Statement*, 25 Fed. Reg. 7291, 7295 (1960).

reaffirmed the importance of licensee responsibility in administering the Fairness Doctrine. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, No. 71–863, decided May 29, 1973, slip op., pp. 15–16, 35–36.

Petitioners' reliance on *Smith* v. *California*, 361 U.S. 147, is misplaced. First, as the court of appeals observed (Pet. App. 16a–17a), there are obvious differences between a bookseller offering thousands of volumes to purchasers for their selection, and a broadcaster selecting particular items to be broadcast to thousands of listeners. Second, in contrast to *Smith*, the effect of the Commission's long-established policy is not to halt or impede dissemination of information. As the court of appeals stated (Pet. App. 17a): "Here the [Commission's] goal is to assure the broadcaster has adequate knowledge. Knowledge is required in order that the broadcaster can make a judgment about the wisdom of its programming. * * * [I]n order to make a judgment about the value of programming one must have knowledge of that programming." The Commission's policy is thus designed to assure that information disseminated over limited public airwaves serves the objectives set forth in *Red Lion* and in the Commission's 1960 *Programming Policy Statement* (quoted in note 1, *supra*). See also *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, *supra*. Thus, regardless of whether *Smith* reaches beyond bulk retailers of printed matter, it does not apply to a broadcaster's duty to know what he selects for broadcast.

Petitioners argue that the Commission censored or attempted to ban the broadcasting of certain material. But the Commission's "definitive" Order of April 16 stated in clear and unequivocal terms (Pet. App. 34a):

> [N]othing in the prior Notice stated, directly or indirectly, that a licensee is barred from presenting a particular type of record. On the contrary, the Notice made clear that selection of records was a matter for the licensee's judgment. * * *

The Commission emphasized that individual judgments by licensees are not reviewable at renewal time, since "our function is solely limited to a review of whether a licensee's programming efforts, on an overall basis, have been in the public interest" (Pet. App. 34a).

The court below thus correctly found that the Order did not ban any types of songs but simply reminded licensees of their fundamental duty to consider whether the programming they are broadcasting will serve the public interest (Pet. App. 13a).[5]

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[5] Contrary to petitioners' suggestion (Pet. 16), the doctrine of licensee responsibility as enunciated by the Commission here is fully compatible with *Anti-Defamation League of B'Nai B'rith* v. *Federal Communications Commission*, 403 F. 2d 169 (C.A.D.C.), certiorari denied, 394 U.S. 930. In *B'Nai B'rith* the Commission granted renewal of a license in the face of a contention that renewal should be denied because the licensee had broadcast anti-Semitic remarks. The court of appeals upheld the Commission's ruling that the First Amendment and Section 326 of the Communications Act prohibited such censorship, and that in these circumstances the complainant's talk

2. The court of appeals' affirmance of the Commission's refusal to issue a declaratory ruling on Yale Broadcasting's proposed policy statement does not, as petitioners contend (Pet. 17–22), conflict with *New York State Broadcasters Ass'n* v. *United States*, 414 F. 2d 990 (C.A. 2), certiorari denied, 396 U.S. 1061. Section 5(d) of the Administrative Procedure Act (5 U.S.C. 554(e)) leaves the issuance of declaratory orders to the "sound discretion" of the agency. The court of appeals held that, because Yale Broadcasting's proposed statement was presented in the abstract, the Commission's refusal to rule on it was not an abuse of that discretion (Pet. App. 25a).

Petitioners apparently do not deny that the proposed policy statement was indeed presented in the abstract, but they urge that "[t]he controlling facts in the Second Circuit's opinion are virtually identical to those in the Court's opinion below" (Pet. 19). This contention overlooks important distinctions between the cases. In *New York State* the Second Circuit directed the Commission to issue declaratory rulings concerning licensees' obligations under the lottery statute (18 U.S.C. 1304), which imposes criminal sanctions. Issuance of such general guidelines by the Commission was necessary because "[t]here have apparently never been any prosecutions for violations of section 1304, and we find no other judicial opinions explicitly

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of licensee responsibility was only a euphemism for censorship. In the present case, the Commission engaged in no censorship, direct or indirect, and, faithful to the principles stated in *B'Nai B'rith*, made it clear that any such action would be unlawful (Pet. App. 34a–35a).

interpreting the 'information concerning' language of the statute" (414 F. 2d at 997–998). Here, on the other hand, in a non-criminal context, the applicable orders reiterated long-standing Commission policy and set forth three specific and non-exclusive methods of meeting licensee responsibilities.

Whether it is an abuse of discretion to refuse to issue a declaratory ruling necessarily turns on the particular facts of each case. The court of appeals was correct in holding that there was no such abuse here, and its resolution of this essentially factual issue does not warrant further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1973.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1495

YALE BROADCASTING COMPANY, ET AL., *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

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July 13, 1973

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PETITIONERS' REPLY BRIEF

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1. The Government avoids the major question in this case. The issue involved is not the validity of some long-established principle that licensees must generally know the content of their programming. Petitioners do not dispute that licensees must be familiar with the quality and general subject matter of their programming.

The question, rather, is the constitutional validity under *Smith* v. *California*, 361 U.S. 147 (1959), of a unique and

unprecedented requirement that licensees must ascertain the social meanings of songs, analyze their individual words, decide whether they glorify illegal conduct, and determine their ultimate impact on the listening audience.

The requirement in this case goes far beyond general familiarity with programming content.[1] It requires licensees, for the first time, to analyze the meaning of popular programming—on a word-by-word basis, and at a managerial level—and judge the "value" of its social message. It singles out song lyrics from other types of programming and subjects them to special procedural burdens. It raises, for the first time, the threat of license revocation for inadequate screening.

The implications of the Government's argument are threatening. Once the Commission's doctrine is established for drugs, there is nothing to prevent the Commission from applying it to violence, sex, political radicalism, or any other area of agency concern.[2] Once the doctrine is established

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[1] The Government's reliance (Brief in Opp., p. 7) on *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), is therefore misplaced. The *NBC* decision merely states that licensees can not wholly ignore the content of network programs. Even if *NBC* did suggest that a licensee must determine whether its programming is "satisfactory" (319 U.S. at 206), it did not set forth a criterion by which "satisfactory" programming should be judged. In particular, *NBC* did not require licensees to audit specific words in its programming, or single out references to specified topics, or make judgments on their social value.

[2] Many operas, for example, depict some form of "illegal" behavior. *Tosca* portrays murder. *Aida* concludes with a suicide. *Salome* depicts a vivid decapitation. *Masked Ball* ends with regicide—the murder of a king. Under the Commission's doctrine, the Government could revoke a station's license for failing to "know the content" of the operas it played—that is, for failing to make a judgment whether their words and lyrics might tend to promote illegal behavior, or might have an adverse "impact" on its audience.

for song lyrics, there is nothing to prevent the Commission from applying it to drama, comedy, or other forms of programming. In each instance, the Commission would be requiring licensees to analyze the content of their programming not for its artistic quality but for the social and moral message hidden in its words. This roving license to intrude on licensees' speech is unprecedented in constitutional law.[3]

2. The Government fails to distinguish *New York State Broadcasters Ass'n* v. *United States*, 414 F.2d 990 (2d Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970). Contrary to the Government's contention, that case did not involve a ruling on criminal liability. In *New York State Broadcasters*, as here, the Commission was asked to issue an *administrative* determination that a broadcaster would forfeit his license for broadcasting specific material. The Commission's decision could have had no binding effect on the licensees' criminal liability under the Lottery Act (18 U.S.C. § 1304), and no effect on the Justice Department's decision to prosecute. *New York State Broadcasters* involved only an administrative ruling, and is indistinquishable from this case.

There was nothing "abstract" about Yale's proposed operating "Policy." Yale submitted a detailed six-page proposal (see Pet. App. 30a) to the Commission. It specifically asked the Commission whether its proposal to broadcast anti-drug public service and news announcements was a satisfactory alternative to screening individual records for their meanings. The Commission refused to rule on Yale's request, even though its proposal was as detailed and specific as the proposals involved in

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[3] *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 492-93 (1962) (Opinion of Harlan & Stewart, JJ.) (burden of requiring publisher to investigate each advertiser raises a "substantial constitutional question"); *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 41 U.S.L .Week 4688, 4706 n.18 (U.S., May 29, 1973) (Douglas, J., concurring).

New York State Broadcasters.[4] The conflict is clear and should be resolved.

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July 13, 1973

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[4] Petitioners in *New York State Broadcasters* asked the Commission, among other things, whether they would jeopardize their license if they broadcast "announcements (unpaid) of the places where Lottery tickets may be purchased" (414 F.2d at 992). The Commission refused to rule on this question, and the Court specifically ordered the Commission to resolve it.

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